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1. Purpose ..... CR 29-1
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1. Purpose

A. Summarize facts

B. Marshal arguments

C. Focus issues for jury

2. Order of Argument

A. Party with burden of proof goes first (usually State)

B. Opposing party responds and argues

C. Rebuttal allowed to party with burden

Marks v St
63 Wis. 2d 769 (1974)

D. Surrebuttal allowed only if State introduces line of argument in rebuttal on which Def had no chance to comment

3. Scope of Argument

St v Johnson
153 Wis. 2d 121 (1990)
St v Lenarchick
74 Wis. 2d 425, 457
(1976)

A. Content, duration, and form of argument within Ct's discretion

St v Draize
88 Wis. 2d 445 (1979)
St v Bergenthal
47 Wis. 2d 668, 681
(1970)

1) Attys should be allowed considerable latitude

St v Draize
88 Wis. 2d 445 (1979)
St v Bergenthal
47 Wis. 2d 668, 681
(1970)

2) Ct has discretion to determine propriety of argument

§ 972.11(1), § 805.10

3) Ct may limit time for argument

B. Guidelines for determining propriety of argument

St v Draize
88 Wis. 2d 445 (1979)

1) Attys may comment on evidence, including

St v Cameron
2016 WI App 54, ¶ 19
370 Wis. 2d 661

a. Arguing evidence to conclusion or inference

b. Arguing that evidence convinces Atty and should so convince jury

St v Bergenthal
47 Wis. 2d 668, 682
(1970)
Embry v St
46 Wis. 2d 151, 160
(1970)

- Atty must make clear opinion based solely on evidence in case

Embry v St
46 Wis. 2d 151, 160–61
(1970)

- Atty may not convey idea that Atty has undisclosed information
  - — Will lead jury to speculate on what was not adduced as evidence at trial

St v Cameron
2016 WI App 54, ¶ 19
370 Wis. 2d 661

- DA may not vouch for witness or otherwise express personal belief or opinion regarding truth or falsity of any testimony or evidence, or on guilt of Def, unless based on the evidence

St v Weiss
2008 WI App 72
312 Wis. 2d 382

- Improper to ask jury to draw inference DA knows or should know is untrue

St v McGee
52 Wis. 2d 736, 749
(1971)

2) Atty's comments on evidence limited to evidence in case

St v Jorgensen
2008 WI 60
310 Wis. 2d 138

a. Atty may not comment on facts outside record peculiarly within Atty's knowledge

St v Pulizzano
155 Wis. 2d 633 (1990)

- Arguments based on syndromes known to DA, but not commonly known, inappropriate unless supported by expert testimony

St v Johnson
153 Wis. 2d 121 (1990)

b. Unflattering characterizations of Def permitted if such descriptions supported by evidence

St v Hagen
181 Wis. 2d 934
(Ct. App. 1994)

c. Unflattering characterization of opposing counsel is improper

St v Neuser
191 Wis. 2d 131
(Ct. App. 1995)
St v Loomer
153 Wis. 2d 645
(Ct. App. 1989)

3) Attys may discuss legal principles presented in instructions of Ct

a. Improper for counsel to make inaccurate statement of the law

b. Improper for counsel to speak for Trial Ct, e.g., as to why Ct gave or refused to give lesser included instruction

St v Phillips
99 Wis. 2d 46, 52
(Ct. App. 1980)

4) Prosecution should generally avoid comment on Def's silence

St v Edwardsen
146 Wis. 2d 198, 213
(Ct. App. 1988)

a. Rule not absolute

US v Robinson
108 S. Ct. 864, 869 (1988)
Griffin v California
85 S. Ct. 1229 (1965)
St v Hoyle
2023 WI 24, ¶ 29
406 Wis. 2d 373

b. Three elements must be present for prosecution to improperly comment on Def's silence

- Language "manifestly intended to be," or "of such character that the jury would naturally and necessarily take it to be," a comment on Def's failure to testify
- Comment on Def's silence is evidence of guilt
- Comment not "a fair response to a claim made by" Def or Def's counsel

St v Edwardsen
146 Wis. 2d 198
(Ct. App. 1988)

c. When defense counsel focuses attention on Def's silence, DA may reflect on Def's silence and not violate constitutional rules

St v Hoyle
2023 WI 24
406 Wis. 2d 373

d. DA may comment on a victim's testimony as being "uncontroverted" by the evidence at trial

St v Phillips
99 Wis. 2d 46, 52
(Ct. App. 1980)

e. Statement should be viewed in context of entire record

St v Johnson
121 Wis. 2d 237
(Ct. App. 1984)

f. When Def makes closing argument, but has not testified, State may comment on difference between argument and evidence

St v Brecht
143 Wis. 2d 297 (1988)
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)

g. Pre-arrest, pre-*Miranda* silence

- State may comment on Def's pre-*Miranda* silence only if Def not being investigated for specific crime, no arrest made, and reasonable person would not conclude that contact was coercive or that Def's freedom of action was being limited

St v Sorenson
143 Wis. 2d 226 (1988)

h. Post-arrest, pre-*Miranda* silence

- If Def testifies, State may comment on post-arrest, pre-*Miranda* silence

St v Brecht
143 Wis. 2d 297 (1988)
St v Fencl
109 Wis. 2d 224 (1982)

- If Def does not testify, State may not comment either on Def's post-arrest silence, or on Def's pre-arrest silence if contacts were coercive, Def was being investigated for specific crime and Def's freedom of action was limited

St v Robinson
140 Wis. 2d 673
(Ct. App. 1987)

i. Post-arrest, post-*Miranda* silence

- Def has due-process right not to have post-*Miranda* silence commented upon

St v Wulff
200 Wis. 2d 318
(Ct. App. 1996)
rev'd on other grounds
207 Wis. 2d 143 (1997)

- When Def chooses to give police a version of events post-*Miranda*, and leaves out significant facts, this evidence can be used to impeach Def's credibility without running afoul of due process and 5th Amendment rights

St v Wolff
171 Wis. 2d 161
(Ct. App. 1992)

5) Improper for a prosecutor to refer to possible penalties in closing argument

6) Cts have developed "invited reply" or "measured response" rule to apply to prosecutor's remarks to determine whether they are reasonable response to defense counsel's attacks

St v Smith
2003 WI App 234
268 Wis. 2d 138

7) Conviction will not be lightly overturned on basis of prosecutor's comments standing alone, but must be viewed in context of total trial

US v Solivan
937 F2d 1146
(6th Cir 1991)

8) Attys should not make closing arguments calculated to incite passions and prejudices of jurors or appeal to jury to act as conscience of community

St v Banks
2010 WI App 107, ¶ 24
328 Wis. 2d 766

9) Due-process violation for a prosecutor to comment on a Def's failure to consent to a warrantless search

St v Burns
2011 WI 22, ¶ 49
332 Wis. 2d 730

10) Test for whether a prosecutor's statements necessitate a new trial in the interest of justice is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process"

4. Improper Argument

St v Holt
128 Wis. 2d 110
(Ct. App. 1985)

A. Objection must be made promptly

B. Failure to object and move for mistrial waives right to object on appeal

St v Guzman
2001 WI App 54
241 Wis. 2d 310
St v Seeley
212 Wis. 2d 75
(Ct. App. 1997)

St v Hagen
181 Wis. 2d 934
(Ct. App. 1994)

C. Ct must give curative instruction

St v Davidson
2000 WI 91
236 Wis. 2d 537

D. Def must move for mistrial to preserve objection to improper argument

St v Kelly
148 Wis. 2d 774
(Ct. App. 1989)

E. Error not preserved unless record of improper remarks

1) Sufficient record can be made

a. By transcript of arguments

b. By stipulation of counsel

c. By Ct reconstructing statements to which objection made on record later

St v Bjerkaas
163 Wis. 2d 949
(Ct. App. 1991)

F. Defense may not urge jury nullification

CR 30: JURY INSTRUCTIONS

1. General Principles Governing Giving of Instructions ..... CR 30-1
2. Instructions Conference ..... CR 30-2
3. Defense-Requested Instructions ..... CR 30-4
4. Lesser Included Offenses ..... CR 30-5
5. Instructions re: Presumptions ..... CR 30-8
6. Party to Crime Instruction ..... CR 30-9
7. *Falsus in Uno* ..... CR 30-9
8. Venue ..... CR 30-9
9. Multiple Counts ..... CR 30-10
10. Instructions Following Final Argument ..... CR 30-10
11. Instructions After Commencement of Jury Deliberations ..... CR 30-11
12. Discharge of Jury on Deadlock ..... CR 30-12

1. General Principles Governing Giving of Instructions

St v Trammell
2019 WI 59, ¶ 23
387 Wis. 2d 156
St v Waites
158 Wis. 2d 376 (1990)

A. Ct has wide discretion as to instructions and the authority to modify the language of pattern instructions

St v McAdory
2021 WI App 89, ¶ 49
400 Wis. 2d 215

However, use caution when modifying pattern instructions because of painstaking effort to accurately state law and provide uniformity

B. Purpose of jury instructions

St v Neumann
2013 WI 58, ¶ 89
348 Wis. 2d 455
St v Bryzek
2016 WI App 48, ¶ 8
370 Wis. 2d 237

1) Fully and fairly inform jury of rules of law applicable to case

2) Assist jury in making reasonable analysis of evidence

St v Dyleski
154 Wis. 2d 306
(Ct. App. 1990)

C. Ct need only give instructions evidence reasonably requires

St v Herriges
155 Wis. 2d 297
(Ct. App. 1990)

1) If instructions adequately explain law applicable to facts, not error to refuse to use specific language requested by Def

St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)

2) Recommendations of Criminal Jury Instruction Committee persuasive, not binding, authority

St v Kramar
149 Wis. 2d 767 (1989)

3) Error to instruct on issue evidence does not support

4) Error to refuse to instruct on issue raised by evidence

St v Seymour
183 Wis. 2d 683 (1994)

5) Error to instruct in disjunctive if alternative acts each constitute a separate offense

Deprives Def of unanimous verdict

St v Trammell
2019 WI 59, ¶ 49
387 Wis. 2d 156

6) "Search for the truth" language in Wis JI-Cr 140 reasonable-doubt instruction does not unconstitutionally lower prosecution's burden of proof below reasonable-doubt standard

§ 972.10(5)

D. Ct must send complete set of written instructions on burden of proof and substantive law to be applied in case to jury room

Recommendation

Provide all final instructions in writing to jury

St v Peterson
220 Wis. 2d 474
(Ct. App. 1998)

E. Def should be present, in open Ct, during the giving of jury instructions

Includes reinstruction and supplemental instructions after jury deliberations have commenced

2. Instructions Conference

A. Informal conference

§ 805.13(3)

1) In chambers or outside presence of jury

§ 805.13(3)

2) In presence of Attys and Def, unless Def waives presence

§ 805.13(3)

3) After close of evidence

St v Camacho
176 Wis. 2d 860 (1993)

B. Formal instructions hearing

1) On record

2) Outside presence of jury

3) Summarize and outline discussions at informal conference

§ 972.10(5)

4) Specific instructions must be requested in writing, signed by party or Atty, and filed with clerk unless Ct directs otherwise

§ 972.10(5)

5) Ct must advise parties as to instructions it intends to give and its reasons for giving them

§ 972.10(5)

6) Parties place objections to particular instructions on record

St v Koch
144 Wis. 2d 838 (1988)

a. Failure to object to instruction waives contention that it should not have been given or was erroneous

St v Schumacher
144 Wis. 2d 388 (1988)
St v Gomaz
141 Wis. 2d 302 (1987)

b. When timely objection not made, new trial can be ordered only if

- Real issue in controversy has not been fully tried, or
- Probable that justice has miscarried, or
- Omitted instruction goes directly to integrity of fact finding process

Recommendation

7) Determine exhibits to go to jury

See **Jury Management, CR 24**, for discussion

St v Kuntz
160 Wis. 2d 722 (1991)

C. Ct must inform counsel of changes made to instructions following jury instruction conference and before delivery to jury

St v Harvey
2022 WI App 60
405 Wis. 2d 332

Failure to do so subject to harmless-error analysis

3. Defense-Requested Instructions

St v Johnson
2021 WI 61, ¶ 17
397 Wis. 2d 633
St v Mendoza
80 Wis. 2d 122, 152–53
(1977)
Ross v St
61 Wis. 2d 160, 172–73
(1973)
St v Schuman
226 Wis. 2d 398
(Ct. App. 1999)

A. Evaluate instruction by viewing evidence in light most favorable to Def

St v Johnson
2020 WI App 50
393 Wis. 2d 688
aff'd in part, rev'd in part
2021 WI 61
397 Wis. 2d 633

1) Without weighing the evidence, Judge must examine whether there is enough evidence that a reasonable jury could find self-defense

St v Stietz
2017 WI 58, ¶¶ 16–17
375 Wis. 2d 572

2) To be entitled to self-defense instruction, Def must meet a low bar by producing only "some evidence" in support, even if that evidence is weak, insufficient, inconsistent, or slight

3) Evaluation determines whether requested instruction based on mere conjecture or reasonable construction of evidence

Mathews v US
108 S. Ct. 883 (1988)

4) Defense-requested instruction supported by evidence should not be denied on grounds that instruction is inconsistent with Def's testimony, because Def may claim inconsistent defenses

B. Theory of defense

St v Coleman
206 Wis. 2d 199 (1996)
St v Gonzalez
2010 WI App 104, ¶ 17
328 Wis. 2d 182,
rev'd on other grounds,
2011 WI 63
335 Wis. 2d 270

1) Warranted when four criteria are present:

   a. Defense relates to a legal theory of a defense, as opposed to an interpretation of evidence;

   b. Request is timely made;

   c. Defense is not adequately covered by other instructions; and

   d. Defense is supported by sufficient evidence

St v Schuman
226 Wis. 2d 398
(Ct. App. 1999)

2) Judge not to weigh evidence; only slight evidence required to create a factual issue and put defense before the jury

3) Weak or doubtful evidence entitles Def to the instruction unless evidence is rebutted by prosecution to extent that no rational jury could entertain a reasonable doubt as to any element of the defense

4. Lesser Included Offenses

A. Statutory authority

§ 939.66(1)
Blockburger v US
52 S. Ct. 180 (1932)
St v Carrington
134 Wis. 2d 260
(1986)

1) A crime that does not require proof of any fact in addition to those that must be proved for crime charged ("elements only" test)

§ 939.66(2), (2m), (2r)

2) Crime that is a less serious offense than charged offense, as defined by statute (e.g., homicide, battery, operating a motor vehicle without owner's consent)

St v Davis
144 Wis. 2d 852 (1988)
St v Glenn
190 Wis. 2d 155
(Ct. App. 1994), *aff'd*,
199 Wis. 2d 575 (1996)

Crime less serious if maximum penalty less than that prescribed for greater offense

§ 939.66(3)

3) Crime that is same as one charged except requires recklessness or negligence instead of criminal intent

§ 939.66(4)

4) Attempt to commit crime charged

5) A crime specified by § 939.66

§ 939.66(4m)

a. Crime of failure to timely pay child support under § 948.22(3) when crime charged is failure to pay child support for more than 120 days under § 948.22(2)

§ 939.66(5)

b. Crime of attempted battery when crime charged is sexual assault, sexual assault of a child, robbery, mayhem or aggravated battery, or attempt to commit any of them

§ 939.66(6)

c. Crime specified in § 940.285(2)(b)4. or 5. (subjecting "individual at risk" to abuse) when crime charged is specified in § 940.19(2)–(6) (battery), § 940.225(1), (2) or (3) (first-, second-, or third-degree sexual assault), or § 940.30 (false imprisonment)

§ 939.66(6c)

d. Crime that is a less serious type of violation under § 940.285 (abuse of individual at risk) than the one charged.

§ 939.66(6e)

e. Crime that is less serious type of violation under § 940.295 (abuse and neglect of patients and residents) than violation charged

§ 939.66(7)

f. Crime specified in § 940.11(2) (hiding corpse) when crime charged is specified in § 940.11(1) (mutilating corpse)

B. Test for submission of lesser included offense

St v Jones
228 Wis. 2d 593
(Ct. App. 1999)
St v Martin
156 Wis. 2d 399
(Ct. App. 1990)

St v Muentner
138 Wis. 2d 374 (1987)

1) First determine whether the crime is a lesser included offense of the charged crime

St v Johnson
2021 WI 61
397 Wis. 2d 633

2) Next, viewing in light most favorable to defense, the Ct must weigh whether there is some evidence from which a reasonable jury could acquit on the greater offense and convict on the lesser offense

St v Sarabia
118 Wis. 2d 655 (1984)

3) Not near-automatic inclusion of all lesser included offenses

St v Sarabia
118 Wis. 2d 655 (1984)

4) When Def presents wholly exculpatory evidence and requests lesser included offense instruction, Ct must reject wholly exculpatory testimony and apply tests to remaining evidence

Clark v St
62 Wis. 2d 194 (1974)

C. Instruction on lesser but not included offense improper

1) Deprives Def of right of notice

2) Violates procedural due process

D. Who may request lesser included offenses

St v Fleming
181 Wis. 2d 546
(Ct. App. 1993)

1) State

2) Def

3) Ct, on own motion

St v Myers
158 Wis. 2d 356 (1990)

a. Ct need not instruct on lesser included unless one party requests it

b. Evidence under reasonable view favorable to Def sufficient to establish guilt of lower degree with reasonable doubt as to higher degree

c. Not error not to instruct on lesser included sua sponte

Wis JI-Cr 112

E. Instructing jury on lesser included offense

1) Jury to first consider charged offense in complaint or information

St v Bergenthal
47 Wis. 2d 668 (1970)

2) Jury not to be given option to pick and choose least offense of which accused might be found guilty

3) Jury considers lesser included offense only if concludes that further deliberations will not result in unanimous agreement on charged offense

St v Truax
151 Wis. 2d 354
(Ct. App. 1989)

4) Failure to give lesser included offense instruction when warranted generally requires reversal

5. Instructions re: Presumptions

St v Kuntz
160 Wis. 2d 722 (1991)

A. Mandatory presumptions

1) Those which instruct jury it must find an element if State proves certain predicate facts

2) Relieves State of burden of proving element, if predicate facts established

Carella v California
109 S. Ct. 2419 (1989)

3) Impermissible

a. Overrides presumption of innocence

b. Invades fact-finding function assigned exclusively to jury

St v Childs
146 Wis. 2d 116
(Ct. App. 1988)

B. Ct may give ordinary and common meaning of undefined term in statute

Jury then determines whether conduct fits definition given

St v Schleusner
154 Wis. 2d 821
(Ct. App. 1990)

C. Permissive inferences

1) Allows, but does not require, trier of fact to find element of crime from proof of another fact

a. Permitted inference must be rationally connected to proven fact and be more likely than not to flow from proven fact

b. Underlying facts must be proved beyond a reasonable doubt

2) Jury must be instructed to independently assess evidence

§ 939.05(1), (2)

6. Party to Crime Instruction

Harrison v St
78 Wis. 2d 189 (1977)

A. Ct may instruct as to commission of crime by principal, aider and abettor, and conspirator

Holland v St
91 Wis. 2d 134 (1979)

1) Such instruction not violative of constitutional right to unanimous verdict

May v St
97 Wis. 2d 175 (1980)
St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

2) No requirement, constitutional or otherwise, that jury must unanimously agree as to alternate ways crime can be committed

St v Oimen
184 Wis. 2d 423 (1994)

3) In felony murder situation, if party to a crime instruction given for underlying offense, it is redundant to repeat it for the homicide

7. *Falsus in Uno*

St v Long
2002 WI App 114
255 Wis. 2d 729
St v Lagar
190 Wis. 2d 423
(Ct. App. 1994)
Wis JI-Cr 305

A. Instruction has generally fallen into disfavor

1) Mere discrepancies likely attributable to defects of memory or mistakes not grounds for *falsus in uno*

2) To be given only if Trial Judge finds something in record that reasonably tends to show witness willfully swore falsely

Could be appearance, demeanor, contradictions between witnesses, inherent incredibility

8. Venue

St v Schultz
2010 WI App 124
329 Wis. 2d 424

If venue disputed, Ct must give jury instruction

9. Multiple Counts

A. When facts do not overlap

Peters v St
70 Wis. 2d 22 (1975)
US v Pacente
503 F2d 543
(7th Cir 1974)

Cautionary instruction required that advises that jury cannot use evidence relating to one charge in finding Def guilty of another charge

Wis JI-Cr 484

B. When facts do overlap

1) Cautionary instruction not required

2) Instruction requires that

   a. Each count charges separate offense

   b. Each count must be considered separately

   c. Question of Def's guilt or innocence on one count may not affect verdict on other counts

10. Instructions Following Final Argument

A. Corrective instructions

St v Asfoor
75 Wis. 2d 411, 432
(1977)

1) Permitted in discretion of Ct, provided

   a. Counsel has argued contrary to instructions previously given, and

St v Asfoor
75 Wis. 2d 411, 432
(1977)
US v Clarke
468 F2d 890 892
(5th Cir 1972)

   b. Necessary to prevent jury from being misled by closing argument of counsel

11. Instructions After Commencement of Jury Deliberations

St v Hubbard
2008 WI 92
313 Wis. 2d 1
St v Gordon
2002 WI App 53
250 Wis. 2d 702
rev'd on other grounds
2003 WI 69
262 Wis. 2d 380
St v Grady
175 Wis. 2d 553
(Ct. App. 1993)

A. Supplemental instruction on definitions of words permitted if

1) In conformity with common, approved usage, and

2) Correctly states the law, and

3) Supported by facts properly before jury

Wis JI-Cr 520

B. Supplemental instructions on jury agreement

Quarles v St
70 Wis. 2d 87, 90 (1975)

(Use of term "*Allen* charge" disapproved)

1) Used when jury unable to reach verdict

2) Purpose limited

   a. Instruction urges "honest and sincere attempt" to arrive at verdict

Mead v Richland Ctr
237 Wis. 537, 540–41
(1941)

   b. Judge may not direct minority to try changing views to coincide with majority

3) Discretionary procedure

   a. No time limit as to when instruction may be given

   b. No requirement whether Ct must first be informed that jury deadlocked

Quarles v St
70 Wis. 2d 87, 90 (1975)

   c. Sua sponte delivery of supplemental instruction not invasion of province of jury

Recommendation

   d. Should be given only once

12. Discharge of Jury on Deadlock

§ 972.01

A. Ct has authority to discharge jury if unable to agree on verdict

Recommendation

B. Supplemental instruction on jury agreement (Wis JI-Cr 520) should be given before determining jury deadlock

1. Verdict Conference ..... CR 31-3
2. Form of Verdict ..... CR 31-3
3. Return of Verdict ..... CR 31-5
4. Jury Nullification ..... CR 31-8

1. Verdict Conference

A. Informal verdict conference

1) Conducted jointly with informal instruction conference

2) In chambers or outside presence of jury

3) In presence of Attys and Def, unless Def waives appearance

4) After close of evidence

805.13
972.10

B. Formal verdict hearing

1) Conducted jointly with formal instruction hearing

2) On record

3) Outside presence of jury

4) Summarize and outline discussions at informal verdict conference

5) Ct must rule as to form and substance of verdicts

   a. Objections must be placed on record

Wis JI-Cr 480

2. Form of Verdict

A. General verdict is usual form

B. Special verdict

1) For property offenses (including welfare fraud) for which value determines class of penalty

2) When venue contested

St v Dombrowski
44 Wis. 2d 486 (1969)

a. Venue must be proved beyond a reasonable doubt, and

Wis JI-Cr 480

b. Separate jury instruction required

C. Lesser included offenses

Wis JI-Cr 112

1) Instruct jury how to consider verdicts when lesser included offense submitted

a. Jury first to consider charged offense in complaint or information

b. Jury to consider lesser included offense only if concludes that further deliberations will not result in unanimous agreement on charged offense

St v Norman
2003 WI 72, ¶¶ 59–64
262 Wis. 2d 506

D. Multiple modes of commission

1) Def's right to unanimous verdict is not violated every time verdict is based on statute with multiple modes of commission

2) In evaluating multiple modes of commission, Cts employ the "fundamental fairness and rationality" test

3) Trial Ct must determine legislative intent

a. Does statute create multiple offenses or single offense with multiple modes of commission?

b. Ct reviews

- Statute language
- Legislative history and context of law
- Nature of proscribed conduct
- Appropriateness of multiple punishment

3. Return of Verdict

St v Behnke
155 Wis. 2d 796 (1990)

A. Counsel must be present, because return of verdict is critical stage, unless Def knowingly and voluntarily waives right to counsel's presence

B. Establish identity of foreperson or presiding juror (if not already known)

1) Inquire of foreperson whether verdict reached

2) Direct foreperson to hand verdict to clerk or Bailiff for delivery to Judge

C. Examine verdict to see whether properly executed and in proper form

1) Facially inconsistent verdicts regarding different charges against Def or involving co-Defs okay

Harris v Rivera
102 SCt 460 (1981)

a. No constitutional requirement that verdicts be explained, provided

- Sufficient evidence supports each, and
- Verdicts are product of fair trial

St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

b. Fact that not guilty verdict inconsistent with another verdict finding Def guilty does not by itself permit reversal because verdicts may result from leniency, mistake, or compromise

St v Hughes
2001 WI App 239
248 Wis. 2d 133
St v Johnson
184 Wis. 2d 324
(Ct. App. 1994)

- Inconsistency in verdicts is not per se grounds for reversal

St v Norman
2003 WI 72
262 Wis. 2d 506
St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

2) Unanimity

a. All jurors must agree to verdict and be unanimous as to ultimate issue of Def's guilt or innocence

St v Johnson
2001 WI 52
243 Wis. 2d 365
St v Koeppen
2000 WI App 121
237 Wis. 2d 418

b. Unanimity not required re: alternative ways in which crime committed, EXCEPT

St v Seymour
183 Wis. 2d 683 (1994)

- Unanimity required when statute uses alternatives to define independent offenses

D. Verdict to be read aloud by Ct or clerk

E. Polling jury

St v Behnke
155 Wis. 2d 796 (1990)

1) Def has right to have jury polled in every case, unless right knowingly and voluntarily waived

St v Yang
201 Wis. 2d 725
(Ct. App. 1996)
St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)
St v Jackson
188 Wis. 2d 537
(Ct. App. 1994)

a. Waiver by counsel satisfies *Behnke* requirement

b. Polling of jury is corollary right to right of unanimous verdict

St v Coulthard
171 Wis. 2d 573
(Ct. App. 1992)

c. Failure to poll can be remedied by reassembling the jury and polling them

Recommendation

d. Ask whether polling wanted in every case

St v Wojtalewicz
127 Wis. 2d 344
(Ct. App. 1985)

St v Behnke
155 Wis. 2d 796 (1990)

2) Inquire of each juror, individually, whether verdict read was, and is now, juror's verdict

   a. Tests whether uncoerced unanimity of verdict exists

   b. Each juror takes personal responsibility by stating publicly that juror agrees with announced verdict

St v Raye
2005 WI 68, ¶¶ 34, 35, 45, 281 Wis. 2d 339
US v Williams
819 F3d 1026, 1033–34
(7th Cir 2016)

3) If a juror disavows the verdict, discontinue the polling. Ct has options:

   a. Return jury to the jury room for continued deliberations,

   b. If juror's response is ambiguous, Ct may inquire of juror further, or

   c. Declare a mistrial

4) If each juror confirms verdict, Ct finds verdict represents true verdict of jury

F. Thank jurors for their service

1) Advise jurors they are not obligated to discuss case or verdict with anyone

2) Discharge jury

G. Request motion for judgment on verdict by prevailing party

1) Rule on motion

   a. With finality, or

   b. Subject to further rulings warranted after full hearing on motion or other postconviction or posttrial motions

H. Enter judgment

1) If guilty

   a. Enter judgment of conviction

b. Judgment subject to any additional rulings

- On opposition to motion for judgment on verdict, or
- On other postconviction motions

St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

c. Verify prior offender status

2) If not guilty

a. Enter judgment of acquittal

b. Discharge Def from terms of bond

4. Jury Nullification

St v Thomas
161 Wis. 2d 616
(Ct. App. 1991)

A. Juries have inherent and fundamental power to return verdict of not guilty irrespective of evidence

1) Right implicit in 6th Amendment right to jury trial

Wis JI-Cr 705

2) Nullification right is referenced in pattern instructions to jury that it "should" find Def guilty if satisfied by evidence, but that jury "must" find Def not guilty if not so satisfied

St v Zdzieblowski
2014 WI App 130, ¶ 16
359 Wis. 2d 102
St v Bjerkaas
163 Wis. 2d 949, 960
(Ct. App. 1991)

B. Jury's nullification power "does not translate to a *right* to have a jury decide a case contrary to law or fact"

1) No right to instruction to jury on nullification

2) No right to make argument to jury urging nullification

CR 32
IMPEACHING JURY VERDICT

1. General Rules ..... CR 32-3
2. Evidentiary Hearing ..... CR 32-5
3. Instances of Misconduct ..... CR 32-6

1. General Rules

906.06(2)

A. Juror may not testify to matters affecting juror's mind, emotions, or mental processes influencing juror to assent or dissent to a verdict

Peña-Rodriguez v Colorado
137 SCt 855 (2016)
St v Williquette
190 Wis. 2d 677 (1995)
St v Messelt
185 Wis. 2d 254 (1994)

1) Rule fosters public policies

a. Discourages harassment of jurors

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

b. Encourages free and open discussion among jurors

c. Reduces incentives for jury tampering

d. Promotes verdict finality

e. Maintains viability of jury as judicial decision-making body

B. Exceptions to general rule

906.06(2)
St v Messelt
185 Wis. 2d 254 (1994)
St v Shillcutt
119 Wis. 2d 788 (1984)
Manke v Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750
St v Searcy
2006 WI App 8
288 Wis. 2d 804

1) Juror is competent to testify when extraneous prejudicial information is improperly brought to jury's attention (extraneous information test)

St v Poh
116 Wis. 2d 510 (1984)
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

a. "Extraneous is both not of record and beyond juror's general knowledge and accumulated life experiences"

Castaneda v Pederson
185 Wis. 2d 199 (1994)

b. The level of "prejudice" under § 906.06(2) that would permit juror to testify so as to impeach a verdict is lower than that necessary to impeach verdict

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

c. "Outside influence" is one imposed on jury from outside by third party

St v Messelt
185 Wis. 2d 254 (1994)
Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

- Juror's bias, prejudice or subjective mental state generally not considered extraneous information or "outside influence"

Comment

d. Based on above, <u>not</u> competent evidence if jurors misunderstood a verdict question, misunderstood the effect of jury's ruling, assented because of fatigue, or claim verdict was not their true belief

Peña-Rodriguez v Colorado
137 SCt 855, 869 (2016)

e. Juror competent to testify if during deliberations a juror makes a statement exhibiting overt racial bias that tends to show that racial animus was a significant motivating factor in the juror's vote to convict

C. Prohibited inquiries

1) Jurors' misunderstanding or intentional misapplication of law

2) Misunderstanding of charge for which Def on trial

3) Coercion or pressure by other jurors

4) Upset or distraction of jurors

5) Verdict arrived at by compromise

Manke v Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

6) Effect of extraneous information on jury deliberations

906.06(2)
Warger v Shauers
135 SCt 521 (2014)

7) Juror cannot testify, as part of inquiry to determine whether another juror failed to reveal relevant information during jury selection, about statements made during deliberations

2. Evidentiary Hearing

A. Preliminary procedure

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

1) Affidavit(s) admissible under § 906.06(2) must be filed to make preliminary showing of entitlement to hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

a. To be admissible, proffered evidence must be competent under § 906.06(2)

2) If affidavits not admissible because not competent, deny motion

St v Eison
194 Wis. 2d 160 (1995)

B. If the affidavit of juror regarding extraneous evidence indicates both a § 906.06(2) exception and facts that would require a new trial

1) Ct must make clear findings on the record

C. Conducting hearing

After Hour Welding
v Laneil Mgmt Co
108 Wis. 2d 734 (1982)
St v Searcy
2006 WI App 8
288 Wis. 2d 804

1) Issues at hearing which Ct should consider and make findings about are

a. Whether statement was in fact made

b. Specifically when it was made

c. Circumstances under which it was made

d. Who made it

e. Which, if any, jurors were present

f. Whether jurors not present were informed of statement

g. Other relevant facts about statement that will assist Trial Ct to assess prospect of unfair prejudice

St v Broomfield
223 Wis. 2d 465 (1999)
St v Searcy
2006 WI App 8
288 Wis. 2d 804

2) At conclusion of hearing, Ct must determine whether party seeking to impeach verdict has cleared three hurdles

Castaneda v Pederson
185 Wis. 2d 199 (1994)

a. Proffered evidence must be competent under § 906.06(2) (based on same standards as for preliminary showing)

St v Searcy
2006 WI App 8
288 Wis. 2d 804
St v Heitkemper
196 Wis. 2d 218
(Ct. App. 1995)

b. Proponent of juror's testimony has clear, satisfactory, and convincing burden

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)

c. Evidence must show prejudice, which is determined by

After Hour Welding v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

- Nature of the matter

St v Faucher
227 Wis. 2d 700 (1999)

- If lack of juror candor is issue, either subjective or objective bias may suffice

Bittner v American Honda Motor Co
181 Wis. 2d 93
(Ct. App. 1993)
rev'd on other grounds
194 Wis. 2d 122 (1995)

- If extraneous information is issue, objective bias is standard: probable effect on hypothetical average juror

St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

D. Only Judge can question juror, but Attys may submit written questions

3. Instances of Misconduct

St v Wyss
124 Wis. 2d 681 (1985)

A. False and misleading answers (lack of juror candor)

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)
St v Olson
179 Wis. 2d 715
(Ct. App. 1993)

1) Test consists of two parts

a. Whether juror incorrectly or incompetently responded to material question on voir dire, and, if so

b. Whether it is more probable than not that under facts of case juror was biased against moving party (statutory bias, subjective bias, or objective bias)

St v Broomfield
223 Wis. 2d 465 (1999)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

2) Ct must consider following factors in reviewing both parts of *Wyss* test

a. Did question asked sufficiently inquire into subject matter to be disclosed by juror?

b. Were responses of other jurors to same question sufficient to put reasonable person on notice that answer was required?

c. Did juror become aware of the false or misleading answers at any time during trial and fail to notify Ct?

St v Faucher
227 Wis. 2d 700 (1999)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

3) Step two of *Wyss* test involves alleged partiality or bias of juror

a. Partiality may be statutory, subjective, or objective bias

b. Issue addressed to discretion of Ct

B. Specific instances of alleged juror misconduct by lack of juror candor

1) Juror referred to Def's race

St v Shillcutt
119 Wis. 2d 788 (1984)

a. Statement lacked sufficient factual content and so was not extraneous; thus, not admissible under § 906.06(2)

Anderson v Burnett Cty
207 Wis. 2d 587
(Ct. App. 1996)
St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

b. The rule of testimonial incompetence of jurors must give way when shown that juror prejudice regarding race, national origin, religion, etc., is of such magnitude as to constitute an obvious default of justice or when fundamental fairness is violated

After Hour Welding v Laneil Mgmt Co
108 Wis. 2d 734 (1982)

2) Juror referred to Atty's religion, Atty's defense of motorcycle gang, and Atty's involvement in suicide of a Judge

a. Case remanded to Trial Ct for hearing

C. Presentation and consideration of extraneous information

St v Faucher
227 Wis. 2d 700 (1999)

1) Extraneous information reaching jurors is not part of evidence and may undermine verdict

St v Broomfield
223 Wis. 2d 465 (1999)
St v Messelt
185 Wis. 2d 254 (1994)

2) Whether extraneous evidence prejudiced jury is question of law and considered only from an objective bias standard

D. Specific instances of alleged juror misconduct due to extraneous information

St v Poh
116 Wis. 2d 510 (1984)

1) Juror referred to "other acts" evidence (not of record) concerning Def's supposed history of drunk driving

a. New trial mandated

Castaneda v Pederson
185 Wis. 2d 199 (1994)

2) Juror researched range of awards in medical malpractice cases

a. Wis Supreme Ct held information was extraneous because not of record and not part of juror's general knowledge and was improperly brought to attention of jury

b. Based on totality of circumstances, Supreme Ct found information to be potentially prejudicial and, thus, a new trial was ordered on damages

Bittner v Amer Honda Motor Co 181 Wis. 2d 93 (Ct. App. 1993) *rev'd on other grounds* 194 Wis. 2d 122 (1995)

3) Juror took unauthorized view of accident scene and told other jurors that accident could not have happened without plaintiff's contributory negligence

a. In seven-week trial with many experts, this one remark said to have little weight on hypothetical average juror

St v Messelt 185 Wis. 2d 254 (1994) *But see St v Faucher* 227 Wis. 2d 700 (1999)

4) In sexual assault prosecution (*Messelt*), four jurors knew of Def's prior sex assault convictions, which were not admitted in evidence, or knew other allegedly extraneous matters. Wis Supreme Ct:

a. Ruled that § 906.06(2) does not prevent jurors from testifying for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire

b. Reaffirmed two-step test of *St v Wyss* in situation in which juror failed to reveal information on voir dire

- That juror incorrectly or incompletely responded, and
- More probable than not that juror was biased against moving party

c. Interpreted § 906.06(2) not to require communication between jurors; i.e., the prejudice of only one juror is sufficient to invalidate verdict

After Hour Welding v Laneil Mgmt Co 108 Wis. 2d 734 (1982)

d. Confirmed three-step analysis of *After Hour Welding*

- Was evidence competent?

- By clear, satisfactory, and convincing evidence were statements made or did alleged misconduct occur?
- If yes, does information constitute prejudice requiring reversal based on an objective bias test only

St v Faucher
227 Wis. 2d 700 (1999)

Johnson v Agoncillo
183 Wis. 2d 143
(Ct. App. 1994)

5) In medical malpractice case, several jurors failed to respond during voir dire to inquiry regarding opinions about effect of medical malpractice awards on health-care costs, and another juror failed to reveal that juror's father was a physician. During deliberations, a nurse said she feared a finding of negligence would come back and haunt her

   a. Ct of Appeals affirmed Trial Ct's finding that juror affidavits of discussions during deliberations were not competent evidence

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

6) Def's motion claimed one or more jurors, before deliberation, made a noose and stated Def "should hang"; one or more jurors indicated, before deliberation, that they would not listen to Def Atty because of his dialect (he was African-American); one or more jurors said, before deliberation, that they should walk out because trial was "useless" and Def was guilty

   a. Ct of Appeals found no basis for evidentiary hearing because Def did not make preliminary showing under § 906.06(2), since no affidavits were filed. Even if affidavits had been filed, allegations did not meet the "fundamental fairness offended" standard

St v Broomfield
223 Wis. 2d 465 (1999)
St v Faucher
227 Wis. 2d 700 (1999)

7) Extraneous information about prior hung jury on Def's case and prior alleged bad acts of Def was not sufficiently prejudicial to reverse verdict under objective bias criteria

Manke v
Physicians Ins Co of Wis
2006 WI App 50
289 Wis. 2d 750

8) Dictionary definition of "neglect" was extraneous information that probably would have the prejudicial effect of deflecting attention away from the jury instruction on negligence

CR 33: DEFENDANT PRESENCE/DISRUPTION

1. Presence of Defendant ..... CR 33-1
2. Physical Restraints ..... CR 33-5
3. Uniformed Security Personnel ..... CR 33-6

1. Presence of Defendant

§ 971.04(1)

A. Def must be present in Ct, either personally or by telephone or live audiovisual means

1) At arraignment (§ 971.04(1)(a))

St v Anderson
2017 WI App 17, ¶ 30
374 Wis. 2d 372
St v Soto
2012 WI 93
343 Wis. 2d 43
See CR 13, Sec. 1.A

2) At a plea hearing

§ 971.04(1)(b)
May v St
97 Wis. 2d 175 (1980)

3) At trial

§ 971.04(1)(c)
St v Tulley
2001 WI App 236
248 Wis. 2d 505
St v Harris
229 Wis. 2d 832
(Ct. App. 1999)
St v David JK
190 Wis. 2d 726
(Ct. App. 1994)

4) When jury being selected, including individualized voir dire

§ 971.04(1)(d)
St v Carter
2010 WI App 37
324 Wis. 2d 208

5) At any evidentiary hearing

§ 971.04(1)(e)

6) At jury view

St v Peterson
220 Wis. 2d 474
(Ct. App. 1998)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

7) During communication between Judge and jury

St v Alexander
2013 WI 70
349 Wis. 2d 327

a. Def need not be present in chambers for colloquy with individual juror about bias issue that arises after trial is underway; Ct should consider

- Whether absence of Def will thwart a "fair and just hearing"
- Whether Def can meaningfully participate
- Whether Def can gain anything by attending
- Whether presence of Def would be intimidating or otherwise counterproductive

§ 971.04(1)(f)

8) When jury returns verdict

§ 971.04(1)(g)
St v Koopmans
210 Wis. 2d 670 (1997)

St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

9) At pronouncement of judgment and imposition of sentence

Ct's statement of reasons for sentencing decision is distinct event and may be in writing per § 973.017(10m)

§ 971.04(1)(h)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

10) At any other proceeding when ordered by Ct, or when Def has personal knowledge relevant to subject at issue

St v Alexander
2013 WI 70
349 Wis. 2d 327

11) At chambers conferences, if Def's absence will thwart a fair and just trial

a. Consider factors listed under **Sec. 1.A.**7) above

St v Clifton
150 Wis. 2d 673, 685–86
(Ct. App. 1989)

b. Def need not be present for discussion solely of law or procedure

Recommendation

c. Def should be present at all times in chambers, unless presence waived by Def on record or unless security precautions suggest otherwise

Leroux v St
58 Wis. 2d 671 (1973)

12) Def not required to be present for pretrial hearing solely on legal or procedural questions

Sanders v St
69 Wis. 2d 242 (1975)
St v Delgado
215 Wis. 2d 16
(Ct. App. 1997)
rev'd on other grounds
223 Wis. 2d 270 (1999)

13) Def need not be present for posttrial hearings unless evidentiary in nature and Def has personal knowledge relevant to issues to be decided

B. See Remote Proceedings, CR 4, for circumstances and requirements when Def may appear by telephone or live audiovisual means

§ 971.04(2)

C. Voluntary absences in misdemeanor proceeding only

1) Def must authorize own Atty to act on Def's behalf

2) Leave of Ct mandatory to accept authorization and to allow Def's absence

§ 971.04(2)

3) Statute authorizes Ct-accepted absence in all proceedings of a misdemeanor case

Recommendation

Despite statutory authorization, Ct should not approve of Def's absence from trial, sentencing, or testimonial hearing in a misdemeanor proceeding

4) There are no authorizations for absence of Defs in felony actions

D. Absence of Def at trial or sentencing

St v Washington
2018 WI 3, ¶¶ 32, 51
379 Wis. 2d 58

1) Def who refuses to cooperate with counsel or courtroom procedures may be held to have waived right to be present

St v Washington
2018 WI 3, ¶ 52
379 Wis. 2d 58

a. Ct may determine waiver based on Def's conduct, but "the best practice is to engage the defendant in a colloquy"

Recommendation

b. Observe procedures for removing disruptive Def in **Sec. 1.E.** below

2) If Def is entirely absent from trial, bench warrant should be issued and trial should not commence

St v Washington
2018 WI 3, ¶¶ 34, 35
379 Wis. 2d 58
St v Dwyer
181 Wis. 2d 826
(Ct. App. 1994)

St v Miller
197 Wis. 2d 518
(Ct. App. 1995)

3) If Def is present at the beginning of trial, and then absconds, trial can be completed as though Def were present

   a. Beginning of jury trial requires that Def be present during voir dire and jurors being sworn

   b. Beginning of Ct trial requires that Def be present when first witness has been sworn

St v Washington
2018 WI 3, ¶¶ 34, 35
379 Wis. 2d 58
St v Koopmans
210 Wis. 2d 670 (1997)

4) If Def has voluntarily absented self, sentencing should not proceed until Def is apprehended and returned to Ct

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

5) If Def is in custody and refuses to be brought to Ct, trial and sentencing may proceed and be completed, because Def has waived constitutional right to be present

Recommendation

Uncooperative Def in custody should be escorted involuntarily to court for trial and sentencing. If Def uncooperative in Ct, Def should be warned on the record by Ct, and if lack of cooperation continues, Def should be removed from Ct

E. Removal by Ct

Illinois v Allen
90 S. Ct. 1057 (1970)
St v Vaughn
2012 WI App 129
344 Wis. 2d 764

1) Def whose conduct so disruptive that trial cannot proceed in orderly manner may be removed

ABA Stds—Special Functions of Trial Judge
§ 6-3.8 (2000)

2) Procedure to be followed before removal

   a. Admonish Def that continued disruption will result in removal

   b. Make record of circumstances requiring removal

   c. Give Def continuing opportunity to return upon good conduct

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

   d. Counsel must continue to represent Def absent waiver

- *See* **Right to Counsel, CR 3**

3) Afford Def reasonable opportunities to confer with counsel during trial

4) Summon Def to courtroom at appropriate intervals with offer to permit Def to remain if behaves

F. Clothing of Def

Estelle v Williams
96 S. Ct. 1691 (1976)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

1) Def's due-process rights violated when Def required to appear at trial in identifiable prison/jail clothing

2. Physical Restraints

St v Miller
2011 WI App 34, ¶ 4
331 Wis. 2d 732

A. Generally, Def should not be restrained during trial

ABA Stds—Special Functions of Trial Judge
§ 6-3.8 (2000)

B. Removal from courtroom of disruptive Def preferable to gagging, handcuffing, and shackling—use all these procedures with great caution

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

"Haste makes waste"

Deck v Missouri
125 S. Ct. 2007 (2005)
Sparkman v St
27 Wis. 2d 92 (1965)

C. Physical restraints may be warranted under unusual circumstances

St v Miller
2011 WI App 34, ¶ 5
331 Wis. 2d 732

1) To maintain order and decorum in courtroom

2) To prevent escape

3) To prevent Def from injuring self or others

St v Grinder
190 Wis. 2d 541 (1995)
St v Knighten
212 Wis. 2d 833
(Ct. App. 1997)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

4) Def's Atty and Def should be heard before order entered

St v Champlain
2008 WI App 5, ¶ 33
307 Wis. 2d 232

5) Determination of restraints in courtroom must be made by Judge, not police

St v Miller
2011 WI App 34, ¶ 11
331 Wis. 2d 732
St v Champlain
2008 WI App 5
307 Wis. 2d 232

6) Even if Def does not object, Ct has duty to determine necessity of restraint, if visible to jury

Harrell v Israel
672 F2d 632
(7th Cir 1982)

7) Shackling may adversely affect Def's credibility as a witness

D. Upon ordering Def restrained

St v Russ
2006 WI App 9
289 Wis. 2d 65
(Anderson, J, concurring)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

1) Exercise discretion, consider less restrictive alternatives, and state reasons for restraint on record

St v Knighten
212 Wis. 2d 833
(Ct. App. 1997)
St v Simplot
180 Wis. 2d 383
(Ct. App. 1993)

2) Attempt to hide restraints from jury's view if possible

Recommendation

Use "skirt" around counsel table

ABA Stds—Trial by Jury
§ 15-3.2(d) (1996)

3) At request of Def's Atty, give remedial instruction to jury to effect: "Such restraint is not to be considered in assessing proof and determining guilt"

US v Van Sach
458 F3d 694
(7th Cir 2006)

If Def is self-represented, give remedial instruction and ask during jury selection whether shackles will influence verdict

3. Uniformed Security Personnel

Holbrook v Flynn
106 S. Ct. 1340 (1986)
St v Clifton
150 Wis. 2d 673
(Ct. App. 1989)

A. Use of uniformed security officers not inherently prejudicial

Recommendation

B. State basis on record for use of any unusual security precautions

CR 34: MENTAL DISEASE OR DEFECT

1. Pretrial Procedure ..... CR 34-1
2. Trial Procedure ..... CR 34-3
3. Commitment If Defendant Found NGI ..... CR 34-7
4. Defendant Committed to Institutional Care ..... CR 34-9
5. Commitment on Conditional Release ..... CR 34-15
6. Violation/Revocation of Conditional Release, Recommitment for Defendants Adjudicated NGI on or After January 1, 1991 ..... CR 34-16
7. Nonfulfillment of Conditional Release, Recommitment for Defendants Adjudicated NGI Before January 1, 1991 ..... CR 34-17
8. Reexamination of Defendants Adjudicated NGI for Offenses Committed on or After January 1, 1991 ..... CR 34-18
9. Reexamination of Defendants Adjudicated NGI for Offenses Committed Before January 1, 1991 is governed by § 971.17(8) ..... CR 34-22
10. Expiration of Commitment Orders ..... CR 34-24

1. Pretrial Procedure

St v Kazee
192 Wis. 2d 213
(Ct. App. 1995)

A. Plea of not guilty by reason of mental disease or defect (NGI) usually made at time of initial appearance in misdemeanor or at arraignment in felony

1) Although no statutory provision sets date by which plea must be made, plea must be entered sufficiently in advance of trial to permit not only suitable notice to prosecutor but also adequate time for implementation of procedures mandated by statute

St v Oswald
2000 WI App 3
232 Wis. 2d 103

a. Ct may reject plea at later stage of proceedings upon balancing interests of Def with institutional need to resolve cases in a timely fashion

2) May be combined with plea of guilty or not guilty

St v Lagrone
2016 WI 26, ¶ 29
368 Wis. 2d 1

3) If NGI plea not accompanied with a not guilty plea, the Def admits the elements of the offense charged. The Ct will find the Def guilty and proceed to the NGI portion of the trial

§ 971.16(2)
RMC Form CR-270

B. Ct may appoint one to three physicians or psychologists, as the Ct's experts, to examine Def and testify at trial

St v Skamfer
176 Wis. 2d 304
(Ct. App. 1993)
St v Burdick
166 Wis. 2d 785
(Ct. App. 1992)

1) Ct to determine compensation

   a. Cty to pay

§ 971.16(3)

2) Report must be submitted to Ct no later than 10 days before trial, or when ordered by Ct

   a. Ct to distribute copies of report to Attys

      - Def's 5th Amendment rights protected by fact that any inculpatory statements made during psychiatric exams inadmissible in guilt phase of trial

St v Jacobson
164 Wis. 2d 685
(Ct. App. 1991)

   b. Contents confidential until physician or psychologist testifies or trial ends

3) Both State and Def may cross-examine

C. DAs or defense Attys may hire own psychiatrist or psychologist at own expense

§ 971.16(5)

D. Contents of report

1) Report must contain opinion on ability of Def to appreciate wrongfulness of conduct or conform conduct with requirements of law at time of offense

2) If sufficient information available to reach opinion, report to include opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

§ 971.16(3)

   a. Def not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism, or drug dependence, and after advantages, disadvantages, and alternatives explained,

- Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR
- Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

NOTE: Explanation of medically unaccepted and unrecognized alternatives not required

§ 971.16(4)

E. If DA or Def hires own expert, report must be furnished to opposing side not less than 15 days before trial

Enis v DHSS
962 FSupp 1192
(WD Wis 1996)

F. Orders for forced medications under § 971.17

1) Section 971.17 is unconstitutional to the extent that it does not require
   a. Finding that inmate is dangerous in confinement
   b. Psychotropic medications are in inmate's medical interest given legitimate needs of institutional confinement
   c. Showing that less intrusive alternatives are not readily available
   d. Periodic review of medication decision
      - GAL not required

2. Trial Procedure

§ 971.165

A. Trial is bifurcated, with issues of guilt and responsibility addressed separately

1) First phase identical to ordinary criminal trial

a. Jury to be informed of Def's pleas and that verdict to be taken upon plea of not guilty before introduction of evidence on plea of NGI

Recommendation

b. Give Wis JI-Cr 601 at start of trial; Wis JI-Cr 602 at end of guilty phase of trial

§ 971.165(1)(c)

c. Same jury for both pleas except

- If one or more jurors of first phase become unable to serve, remaining jurors to determine second plea
- If judgment on 2nd plea reversed on appeal but 1st not, and case remanded, or Trial Ct vacates judgment as to 2nd plea but not 1st, 2nd plea may be determined by different jury

St v Weber
174 Wis. 2d 98
(Ct. App. 1993)

Steele v St
97 Wis. 2d 72, 97–98
(1980)

d. Experts may not testify, based on Def's mental health, on issue of Def's capacity to form intent in guilt phase of trial

Recommendation

e. If guilt established on first plea, Wis JI-Cr 603 should be given before evidence introduced on mental responsibility

§ 971.165(1)(a)
St v Locke
177 Wis. 2d 590
(Ct. App. 1993)

f. Error in guilt phase necessarily requires retrial of both phases

St v Lagrone
2016 WI 26, ¶ 53
368 Wis. 2d 1

g. If Def chooses to admit guilt, regular guilty plea procedure should be used for first phase

2) Second phase addresses mental disease or defect

St v Lagrone
2016 WI 26, ¶ 57
368 Wis. 2d 1

a. Although a better practice, Ct need not conduct a right-to-testify colloquy at the responsibility phase

§ 971.15(3)
St v Magett
2014 WI 67,¶ 38
355 Wis. 2d 617

b. Mental disease or defect excluding responsibility is affirmative defense, which Def must establish to reasonable certainty by greater weight of credible evidence

§ 971.15(2)

c. Terms *mental disease* or *mental defect* do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct

St v Magett
2014 WI 67,¶ 39
355 Wis. 2d 617
St v Leach
124 Wis. 2d 648, 663–64
(1985)

d. Ct may direct verdict against Def on issue of mental responsibility if Def fails to present sufficient evidence to create a jury question when evidence viewed in light most favorable to Def

St v Kucharski
2015 WI 64, ¶ 32
363 Wis. 2d 658
St v Magett
2014 WI 67, ¶¶ 41–44
355 Wis. 2d 617

e. Although an expert may be helpful, favorable expert testimony is not a prerequisite to finding a mental disease or defect

§ 971.165(2)

f. Ct must inform jury of effect of NGI verdict

- Def will be committed to custody of DHS and placed in appropriate institution unless Ct determines Def would not pose danger to self or others if released under Ct-imposed conditions-in lieu of criminal sentence or probation

§ 971.165(3)(a)

g. If Def NOT found NGI, Ct must enter judgment of conviction and impose or withhold sentence

§ 971.165(3)(b)

h. If Def found NGI, Ct must enter judgment of NGI and proceed under § 971.17 (see **Sec. 3** below)

- Judgment interlocutory to commitment order under § 971.17 and reviewable upon appeal from that order

§ 971.165(2)

- 5/6 verdict required

St v Koput
142 Wis. 2d 370 (1988)

i. If error in responsibility phase of bifurcated trial, only retrial of responsibility phase is appropriate

§ 971.16(5)

B. Trial testimony of examiner

1) May cover nature of examination

St v Lindh
161 Wis. 2d 324 (1991)

a. Constitutional privilege against self-incrimination does not require exclusion of results of psychiatric interview with Def from second phase of trial on grounds that psychiatrist did not comply with dictates of *Miranda*

§ 971.16(5)

2) May include diagnosis of mental condition of Def at time of commission of offense charged

3) May contain opinion as to ability of Def to appreciate wrongfulness of conduct or to conform to requirements of law

4) May contain opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

St v Weber
174 Wis. 2d 98
(Ct. App. 1993)

5) Evidence too highly prejudicial at guilt phase may be admissible at second phase, particularly if new jury

Enis v DHSS
962 FSupp 1192
(WD Wis 1996)

6) May contain opinion on whether Def needs medication or treatment and whether Def not competent to refuse medication or treatment

a. Testimony regarding Def's need for and competence to refuse medication or treatment may <u>not</u> be presented before jury determining Def's ability to appreciate wrongfulness of conduct

§ 971.16(2)

7) Cross-examination permitted. Both parties may cross-examine Ct's experts

St v Lindh
161 Wis. 2d 324 (1991)

a. Ct may limit cross-examination of expert to

- Issues that tend to make more or less likely the accuracy and correctness of diagnosis and professional opinion in case
- Expert's character for truthfulness and untruthfulness

b. Use of irrelevancies on cross-examination insinuating that witness is person of bad moral character not a proper impeachment device

3. Commitment If Defendant Found NGI

§ 971.17(2)

A. Ct must enter initial commitment order pursuant to hearing held as soon as practicable after judgment

1) If Ct unable to determine whether Def to be committed under institutional care or on conditional release immediately after trial, Ct may adjourn hearing and order DHS to conduct predisposition investigation using § 972.15 procedure, supplementary mental examination, or both

§ 971.17(2)(b)

a. If supplementary mental examination ordered, Ct may appoint one or more examiners having specialized knowledge determined by Ct to be appropriate to examine and report on condition of Def

b. In lieu of appointing examiner(s), Ct may commit Def to appropriate mental health facility for examination

§ 971.17(2)(c)

- Report filed within 15 days after examination ordered
- For good cause, Ct may allow one 15-day extension

§ 971.17(2)(b)

- Time spent in facility to be counted as days spent in custody under § 973.155

§ 971.17(2)(c)

c. Outpatient examination report must be filed within 15 days after examination ordered

§ 971.17(2)(e)

d. Examiner must personally observe and examine Def

e. Examiner must have access to Def's past or present treatment records and patient health-care records

f. If examiner believes Def appropriate for conditional release, examiner must report on type of treatment and services Def may need while in community on conditional release

§ 971.17(2)(f)

g. Costs of examination paid by Cty upon order of Ct as part of costs of action

§ 971.17(2)(g)

h. Within 10 days after examiner's report filed, Ct must hold hearing to determine whether commitment to be institutional care or conditional release

§ 971.17(3)(a)

B. Commitment order must specify institutional care or conditional release

1) Ct may consider, without limitation

a. Nature and circumstances of crime

b. Def's mental history and present mental condition

c. Where Def will live

d. How Def will support self

e. What arrangements available to ensure Def has access to and will take necessary medication

f. What arrangements possible for treatment beyond medication

St v Wilinski
2008 WI App 170, ¶ 10
314 Wis. 2d 643

2) Ct must order institutional care if finds by clear and convincing evidence that conditional release of Def would pose significant risk of bodily harm to self or others or of serious property damage

St v Brown
2010 WI App 113, ¶ 16
328 Wis. 2d 241

a. "Serious property damage" includes not only physical harm or destruction, but also loss of goods or money

b. If finding not made, Ct must order conditional release

§ 971.17(3)(b)

C. Ct must issue, as part of commitment order, order that Def not competent to refuse medication or treatment, IF

1) State proves by clear and convincing evidence that Def not competent to refuse medication or treatment

St v Wood
2010 WI 17, ¶¶ 34–38
323 Wis. 2d 321

2) Dangerousness finding is unnecessary; dangerousness finding is implicit in § 971.17(3)

D. Period of commitment

§ 971.17(1)
St v Fugere
2019 WI 33, ¶ 47
386 Wis. 2d 76

1) If Def found NGI for felony committed on or after July 30, 2002, Def committed to DHS for period not exceeding maximum term of initial confinement (not including extended supervision) that could be imposed, plus term of confinement authorized by any applicable penalty enhancement statutes

   a. For Def found NGI for felony committed before July 30, 2002, apply formula for misdemeanors in para. 2) below

2) If Def found NGI for misdemeanor, Def committed to DHS for period not exceeding two-thirds maximum term of imprisonment that could be imposed, including periods authorized by any applicable penalty enhancement statutes

3) If maximum term is life, commitment period (for Def found NGI for felony) may be life subject to termination by petition

St v Yakich
2022 WI 8
400 Wis. 2d 549
St v CAJ
148 Wis. 2d 137
(Ct. App. 1988)

4) In multiple offense situations, maximum period of commitment is defined by consecutive maximum terms

4. Defendant Committed to Institutional Care

§ 971.17(3)(a)

A. Ct must commit Def to institutional care only if Ct finds by clear and convincing evidence that conditional release of Def would pose significant risk of bodily harm to Def or others or of serious property damage

§ 971.17(3)(c)
§ 51.37(3)

B. DHS must place Def in Winnebago or Mendota Mental Health Institutes

§ 51.37(4)

1) DHS, with approval of committing Ct and Cty Dept under § 51.42 or § 51.437 may transfer care and custody of Def to that Cty Dept

   a. Transfer subject to § 51.35 (*See* **Probate, Guardianship and, Mental Health Benchbook, MH 3**)

§ 971.17(3)(c)
St v Wood
2010 WI 17
323 Wis. 2d 321

C. If Def not subject to Ct order finding Def not competent to refuse medication or treatment and if institution determines Def should be subject to such Ct order

1) Institution may file with Ct motion for hearing on whether Def not competent to refuse medication or treatment

   a. Notice to Def, Def's Atty, and DA

§ 971.16(3)

2) Standard: Def not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism, or drug dependence, and after advantages, disadvantages, and alternatives explained,

   a. Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR

   b. Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

   NOTE: Explanation of medically unaccepted and unrecognized alternatives NOT required

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

St v Wood
2010 WI 17, ¶¶ 34–38
323 Wis. 2d 321

3) Dangerousness finding is unnecessary; dangerousness finding is implicit in § 971.17(3)

St v Wood
2010 WI 17
323 Wis. 2d 321

§ 971.17(3)(c)

4) Periodic review of involuntary order required

5) Report on which motion based must accompany motion and notice of motion and must include statement signed by licensed physician that asserts

   a. Def needs medication or treatment

   b. Def not competent to refuse medication or treatment

      - Statement to be based on examination of individual by licensed physician

6) Hearing must be held within 10 days after filing of motion

   a. Evidentiary hearing held before Ct unless DA, Def, and Def's Atty waive opportunity to present evidence

   b. If all waive, summary hearing held based on report accompanying motion

   c. At request of Def, Def's Atty, or DA, hearing may be postponed up to 20 days after motion filed

§ 971.17(7)(d)

   d. On approval by Ct for good cause, testimony may be received on record by telephone or live AV means

7) State must prove Def not competent to refuse medication or treatment by clear and convincing evidence

§ 51.37(9)

D. Conditional transfers or discharges

1) If director of institution to which Def committed judges Def not in such condition as warrants return to Ct but in condition to receive conditional transfer or discharge under supervision, director must report to DHS, committing Ct, and DA of Cty where Ct located, reason for such judgment

   a. If Ct does not file objection within 60 days after date of report, director may conditionally transfer Def to legal guardian or other person subject to rules of DHS and DOC

§ 51.37(10)

E. Home visits and leaves of absence

1) Director of State treatment facility may grant home visit or leave for employment or education purposes for up to 15 days

   a. Must notify committing Ct and DOC of intent to grant home visit or leave at least 20 days before departure of Def from facility

§ 51.61

F. Rights of Defs committed under § 971.17 same as those for any involuntarily committed person (*see* Patients' Rights in Probate, Guardianship, and Mental Health Benchbook, MH 5) EXCEPT

§ 51.61(1)(i)

1) Persons committed or transferred under § 51.35(3) or § 51.37 or Ch 971 or Ch 975, or detained or committed under Ch 980, and transferred to hospital may be isolated for security reasons within locked facilities in hospital

2) Persons committed or transferred under § 51.35(3) or § 51.37 or Ch 971 or Ch 975, or detained or committed under Ch 980, may be restrained for security reasons during transport to or from facilities

§ 51.64(1)(a)

   a. Physical restraint includes all the following

      - Locked room
      - Device or garment that interferes with individual's freedom of movement and that individual is unable to remove easily
      - Restraint by treatment facility staff member by use of physical force

§ 51.61(1)(i)

3) Rights are restricted when patient in maximum security at MMHI. *See* para. 4) below for additional restrictions if person detained or committed under Ch 980

   a. May be locked in rooms during night shift and for up to 1-½ hours during each change of shift by staff to permit staff review of patient needs

b. May also be locked in rooms on unit-wide or facility-wide basis as emergency measure as needed for security

- May only be authorized by director of unit or facility or designee and to be approved within one hour after it is authorized by director of MMHI or designee
- Emergency isolation order may only be in effect for time needed to preserve order while dealing with situation and may not be used as substitute for adequate staffing
- Status of each patient must be reviewed every 30 minutes
- If patient in room without toilet, must be given opportunity to use one at least once every hour

c. Each unit in maximum security facility at MMHI and in facility specified under § 980.065 must have written policy covering use of isolation that ensures

- Dignity of individual protected
- Security of individual protected
- Safety of individual secured
- Regular and frequent monitoring by trained staff

§ 51.61(1)(i)2.

4) Additional restrictions if person detained or committed under Ch 980 and placed in facility specified under § 980.065

a. May be locked in room during night shift

- If resides in maximum or medium security unit in which each room has toilet or sink, or
- If resides in unit where each room not equipped with toilet and sink, and number of patients outside their rooms equals or exceeds number of toilets in unit

— Except persons who do not have toilets in room must be given opportunity to use one at least once every hour, or more frequently if medically indicated

§ 51.61(1)(o)

5) Patient at Goodland Hall at MMHI, or patient detained or committed under Ch 980, or patient who is in legal custody of or under supervision of DOC, may be subject to video surveillance or filmed or taped without consent, except not in bedrooms or bathrooms without consent unless patient is engaged in dangerous or disruptive behavior

St v Skamfer
176 Wis. 2d 304
(Ct. App. 1993)

a. Def is considered a prisoner within the meaning of § 940.20(1) (battery by prisoner)

§ 51.61(7)

G. Def committed under § 971.17 may bring suit for damages

1) Patient whose rights protected who suffers damage as result of unlawful denial or violation of rights may bring action against person, State, or any political subdivision that unlawfully denies or violates right

a. Patient may recover actual damages and exemplary damages of not less than $100 for each violation plus costs and reasonable actual Atty fees

2) Patient whose rights protected may bring action against person, State, or any political subdivision, which willfully, knowingly, and unlawfully denies or violates any rights protected

a. Patient may recover actual damages and exemplary damages of not less than $500 or more than $1,000 for each violation, together with costs and reasonable actual Atty fees

- Not a prerequisite that plaintiff suffer or be threatened with actual damages

3) Patient may bring action to enjoin unlawful violation or denial of rights

a. May, in same action, seek damages and recover costs and reasonably actual Atty fees if patient prevails

4) Use of grievance procedure NOT a prerequisite to bringing action

RMC Form CR-275

5. Commitment on Conditional Release

§ 971.17(3)(a)

A. Ct must order conditional release unless Ct finds by clear and convincing evidence that release would pose significant risk of bodily harm to Def or others or of serious property damage

§ 971.17(3)(d)
RMC Form CR-274

B. DHS and Cty Dept under § 51.42 in Cty of Def's residence must prepare plan that identifies treatment services, if any, that Def to receive in community

1) Plan must specify who will be responsible for providing identified treatment and services

§ 971.17(3)(d)

2) Plan must be presented to Ct for approval within 21 days after Ct finding that Def appropriate for conditional release

a. Unless DHS, Cty Dept, and Def request additional time

§ 971.17(3)(e)

C. Conditional release places Def in custody and control of DHS

1) Subject to conditions set by Ct and rules established by DHS

D. Before releasing Def, Ct must notify municipal police dept and Cty sheriff for area where Def to reside

1) Does not apply if written statement waiving right to be notified submitted

6. Violation/Revocation of Conditional Release, Recommitment for Defendants Adjudicated NGI on or After January 1, 1991

A. Violation of conditional release

§ 971.17(3)(e)

1) If DHS alleges Def violated condition or rule or safety requires that conditional release be revoked, Def may be taken into custody under DHS rules

St v Olson
2019 WI App 61, ¶ 2
389 Wis. 2d 257

2) DHS "shall submit" statement showing probable cause for detention and petition to revoke order for conditional release to committing Ct and regional office of SPD within 72 hrs after detention, excluding Saturdays, Sundays, and legal holidays

   a. DHS may detain Def in jail or hospital, center, or facility specified by § 51.15(2)(d)

B. Ct action if violation alleged

1) Ct must hear petition within 30 days

   a. Unless time deadline waived by Def

   b. Unless hearing waived

   c. 30-day period in § 971.17(3)(e) is directory and not mandatory, but is not permissive or discretionary

St v Schertz
2002 WI App 289
¶¶ 8–14
258 Wis. 2d 351

2) At hearing, State has burden of proving by clear and convincing evidence that

   a. Rule or condition of release violated OR

   b. Safety of Def or others requires revocation

3) If Ct determines after hearing that rule or condition violated or safety of Def or others requires revocation of conditional release

   a. Ct may revoke order for conditional release and

b. Order Def placed in Winnebago or MMHI until expiration of commitment or until again conditionally released

§ 971.17(7m)
St v Klapps
2021 WI App 5, ¶¶ 16–27, 395 Wis. 2d 743

4) Postdisposition relief may be sought by

a. Postdisposition motion addressing issues not previously raised, such as judicial bias, or

b. Direct appeal to address sufficiency of the evidence or issues already raised

St v Mahone
127 Wis. 2d 364
(Ct. App. 1985)

C. Minimum requirements of due process in revocation/recommitment hearings are

1) Initial hearing to justify detention pending final commitment hearing

2) Written notice of violation

3) Disclosure of evidence against Def

4) Opportunity to be heard in person and to present witnesses and evidence

5) Right to confront and cross-examine adverse witnesses

a. Unless Ct finds good cause for nonconfrontation

6) Neutral and detached hearing body

7) Written statement by fact-finder as to evidence relied on and reasons for revocation

§ 971.17 (1987–88), *as affected by* 1989 Wis Act 31

7. Nonfulfillment of Conditional Release, Recommitment for Defendants Adjudicated NGI Before January 1, 1991

§ 971.17(3) (1987–88)

A. Within maximum period for which Def could have been imprisoned if convicted of offense charged

1) If Ct determines after hearing that

a. Conditions of release not fulfilled, and

b. Safety of Def or others requires that conditional release be revoked

2) Ct must immediately order Def recommitted to DHS

a. Subject to discharge or release only in accordance with § 971.17(2) (1987–88)

b. See **Reexamination, Secs. 8 and 9**, below

St v Mahone
127 Wis. 2d 364
(Ct. App. 1985)

B. Minimum requirements of due process in revocation/recommitment hearings are

1) Initial hearing to justify detention pending final commitment hearing

2) Written notice of violation

3) Disclosure of evidence against Def

4) Opportunity to be heard in person and to present witnesses and evidence

5) Right to confront and cross-examine adverse witnesses

a. Unless Ct finds good cause for nonconfrontation

6) Neutral and detached hearing body

7) Written statement by fact-finder as to evidence relied on and reasons for revocation

8. Reexamination of Defendants Adjudicated NGI for Offenses Committed <u>on or After January 1, 1991</u>

§ 971.17(4)(a)

A. Committed Def or DHS may petition for conditional release

1) Def may petition committing Ct to modify order by authorizing conditional release if at least 6 months elapsed since

a. Initial commitment order entered, or

b. Most recent release petition denied, or

c. Most recent order for conditional release revoked

2) Director of facility at which Def placed may file petition for conditional release on Def's behalf at any time

§ 971.17(4)(b)

3) Application made to committing Ct with notice to DA

a. If Def files timely petition without Atty, Ct must serve copy on DA and refer to SPD for determination of indigency and appointment of Atty

b. If Def petitions through Atty, Atty must serve DA

§ 971.17(4)(c)

4) Within 20 days after receipt of petition, Ct must appoint one or more examiners to examine Def and furnish written report of examination to Ct within 30 days after appointment

B. Hearing procedure

§ 971.17(7)(a)

1) Committing Ct must conduct all hearings

§ 971.17(4)(d)

2) No right to jury trial

3) Hearing must be held within 30 days after report of Ct-appointed examiner filed with Ct

a. Def may waive time limit

St v RAR
147 Wis. 2d 218
(Ct. App. 1988)

b. Failure of Ct to hold reexamination hearing within statutory time limit does not entitle Def to discharge from commitment

§ 971.17(7)(d)

4) Upon consent of all parties and approval by Ct for good cause, Ct may receive testimony by telephone or live AV means

§ 971.17(7)(b)

5) Def has right to

a. Counsel

b. Remain silent

c. Present and cross-examine witnesses

d. Have hearing recorded by Ct reporter

§ 971.17(7)(c)

C. Examination of Def by physician, psychologist, or expert of Def's choice

1) Upon motion of indigent, Ct must appoint examiner at public expense

2) Examiner for Def or DA must have reasonable access to Def for examination, and

a. Access to Def's past and present treatment records

b. Access to Def's patient health-care records

§ 971.16(4)

3) No testimony regarding mental condition of Def received from physician, psychologist, or expert summoned by Def unless

a. Report of examination transmitted to DA not less than 15 days before trial, and

b. Prosecution afforded opportunity to examine and observe Def if such opportunity seasonably demanded

4) No testimony regarding mental condition of Def received from physician, psychologist, or expert summoned by State unless

a. Written report of examination of Def transmitted to Def's Atty not less than 15 days before trial

§ 971.17(4)(d)
St v Randall (*Randall I*)
192 Wis. 2d 800, 833
(1995)
see also Foucha v Louisiana
112 SCt 1780 (1992)

D. Sole issue is Def's dangerousness to self or others

1) State bears burden to show Def's continued dangerousness by clear and convincing evidence

2) Ct may consider, without limitation

a. Nature and circumstances of crime

b. Def's mental history and present mental condition

c. Where Def will live

d. How Def will support self

e. What arrangements made to ensure Def has access to and will take necessary medication

f. What arrangements possible for treatment beyond medication

E. Two possible dispositions

§ 971.17(4)(e)

1) Order Def conditionally released

a. DHS and Cty Dept under § 51.42 in Cty of residence of Def must prepare treatment and service plan, if any

b. Plan must specify who is responsible for providing treatment and services identified

c. Plan must be presented to Ct for approval within 60 days after Ct finds Def appropriate for conditional release

- Unless DHS or Cty Dept and Def request additional time

§ 971.17(3)(e)

d. Ct must notify police dept and sheriff where Def to reside of conditional release unless notice waived in writing

2) Recommit to DHS

§ 971.17(5)

F. Petition for termination

1) Def on conditional release, or DHS on Def's behalf, may petition for termination of order of commitment

a. May not be filed unless at least 6 months elapsed since Def last placed on conditional release or since most recent petition for termination denied

2) Application made to committing Ct, notice to DA

a. If Def files timely petition without Atty, Ct must serve copy on DA and refer to SPD for determination of indigency and appointment of Atty

b. If Def petitions through Atty, Atty must serve DA

3) Ct must determine petition as timely as practicable

4) Ct hearing only, no right to jury

St v Randall (Randall I)
192 Wis. 2d 800, 833
(1995)

5) Sole issue is Def's dangerousness to self or others

a. State bears burden by clear and convincing evidence to show Def's continued dangerousness

6) Ct may consider, without limitation

a. Nature and circumstances of crime

b. Def's mental history and present mental condition

c. Def's behavior while on conditional release

d. Where Def will live

e. How Def will support self

f. What arrangements available for treatment and other required services after termination

§ 971.17(8)

9. Reexamination of Defendants Adjudicated NGI for Offenses Committed Before January 1, 1991 is governed by § 971.17(8)

§ 971.17(2) (1987–88)

A. Committed Def or DHS may petition for release

1) Application made to committing Ct

St ex rel Gebarski v Circuit Ct
80 Wis. 2d 489, 491
(1977)

2) Ct trial or jury of six available

3) Notice to DA

B. Hearing

§ 971.17(2) (1987–88)
St ex rel Gebarski v Cir Ct
80 Wis. 2d 489 (1977)
St v Randall (Randall III)
2011 WI App 102, ¶ 15
336 Wis. 2d 399

1) Sole issue is Def's dangerousness to self or others

St v Randall (Randall II)
222 Wis. 2d 53
(Ct. App. 1998)

a. State bears burden to show Def's continued dangerousness by clear, satisfactory, and convincing evidence

St v Randall (Randall III)
2011 WI App 102, ¶¶ 15–16, 336 Wis. 2d 399

b. Ct may consider factors set forth in § 971.17(4)(d) (2009–10)

§ 51.20(16)

2) No hearing before 30 days after original commitment

3) Hearing at Ct's discretion if request between 30 and 120 days after filing

a. Ct, within 24 hours, must order examination to be completed within 7 days by appropriate Cty Dept

4) Hearing must be held on petition for reexamination filed more than 120 days after last hearing on mental condition

a. Held within 30 days after receipt of petition

5) Testimony may be received by telephone or live AV means

a. If Ct approves for good cause

§ 971.17(2) (1987–88)

C. Three possible dispositions

1) Order Def discharged

2) Order Def released

a. Ct may impose conditions

b. Ct must notify municipal police dept and Cty sheriff where Def to reside of conditional release unless notice waived in writing

3) Recommit to DHS

10. Expiration of Commitment Orders

§ 971.17(4) (1987–88)

A. Persons whose offense committed before Jan. 1, 1991—When maximum period for which Def could have been imprisoned if convicted of offense charged has elapsed, Ct must order Def discharged

1) Subject to right of DHS to proceed against Def under Ch 51

2) Ct may order DHS to proceed under § 51.20

a. *See* **Probate, Guardianship, and Mental Health Benchbook, MH 1** for § 51.20 involuntary commitment procedure

§ 971.17(6)

B. Persons whose offense committed on or after Jan. 1, 1991—When maximum period for which Def could have been imprisoned if convicted of offense charged has elapsed, Ct must order Def discharged

1) Subject to right of DHS or appropriate Cty Dept to proceed against Def under Ch 51 or Ch 55

a. Ct may order DHS or Cty Dept to proceed

2) At least 60 days before expiration of commitment order, DHS must notify

a. Committing Ct

b. DA

c. Appropriate Cty Dept

CR 35: MISTRIAL

1. Motion Directed to Sound Discretion of Court ..... CR 35-1
2. Before Declaring a Mistrial, Consider Alternatives ..... CR 35-1
3. Potential Grounds for Mistrial ..... CR 35-1
4. Before Granting Mistrial, Consider Whether Double Jeopardy Will Bar State from Retrying the Case ..... CR 35-3

1. Motion Directed to Sound Discretion of Court

St v Ross
2003 WI App 27, ¶ 47
260 Wis. 2d 291

A. Ct determines whether, in light of whole proceeding, claim of error sufficiently prejudicial to warrant new trial

St v Nienhardt
196 Wis. 2d 161
(Ct. App. 1995)

B. Ct may conduct or allow voir dire of juror(s) to determine potential prejudice

2. Before Declaring a Mistrial, Consider Alternatives

St v Bunch
191 Wis. 2d 501, 506,
512 (Ct. App. 1995)

A. Not all errors warrant mistrial; "the law prefers less drastic alternatives, if available and practical"

B. Examples of alternatives

St v Copening
100 Wis. 2d 700 (1981)

1) Continuance

St v Moeck
2005 WI 57
280 Wis. 2d 277
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Curative instruction

St v Troka
2016 WI App 35
369 Wis. 2d 193

3) Withdraw undisclosed witness or evidence

3. Potential Grounds for Mistrial

A. Hung Jury

1) *See* **CR 24, Sec. 9**

B. Juror misconduct

See CR 24, Sec. 4

1) Sleeping or inattentive juror

Am Fam Mut Ins Co v Shannon
120 Wis. 2d 560 (1984)

2) Unauthorized view of scene

St v Broomfield
223 Wis. 2d 465 (1999)

3) Exposure to extraneous information not in record

St v Nienhardt
196 Wis. 2d 161
(Ct. App. 1995)

4) Communications or contacts with parties, witnesses, or Attys

St v Faucher
227 Wis. 2d 700 (1999)
St v King
120 Wis. 2d 285
(Ct. App. 1984)

5) Familiarity with parties, witnesses, or Attys

Oseman v St
32 Wis. 2d 523, 530
(1966)

6) Reading published articles about case

C. Defense misconduct

St v Williams
2004 WI App 56
270 Wis. 2d 761

1) Improper questioning

St v Moeck
2005 WI 57
280 Wis. 2d 277

2) Improper remarks

D. Prosecutorial misconduct

St v Copening
100 Wis. 2d 700 (1981)
St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

1) Failure to turn over evidence

St v Barthels
174 Wis. 2d 173 (1993)
limited on other grds by
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Failure to ensure presence of essential witness

St v Jenich
94 Wis. 2d 74 (1980)
St v Tappa
123 Wis. 2d 210
(Ct. App. 1985)
rev'd on other grds
127 Wis. 2d 155 (1985)

3) Improper remarks/argument

St v Fencl
109 Wis. 2d 224 (1982)
limited by
St v Sorenson
143 Wis. 2d 226 (1988)
St v Jaimes
2006 WI App 93
292 Wis. 2d 656

4) Eliciting testimony or commenting on Def's failure to testify at trial, on Def's pretrial silence (if Def does not testify at trial), or on Def's post-*Miranda* silence (if Def testifies at trial)

St v Debrow
2023 WI 54
408 Wis. 2d 178

5) Eliciting testimony alluding to Def's prior criminal history

4. Before Granting Mistrial, Consider Whether Double Jeopardy Will Bar State from Retrying the Case

St v Seefeldt
2003 WI 47, ¶ 19
261 Wis. 2d 383

A. Unless Ct finds "manifest necessity" to terminate trial over Def's objection, State is barred from retrying case

1) "Manifest necessity" means a "high degree" of necessity

St v Green
2023 WI 57, ¶ 24
408 Wis. 2d 248
cert denied
144 S. Ct. 578 (2024)

2) Before deciding that manifest necessity justifies mistrial, Ct should

a. Give parties opportunity to explain positions and consider less drastic alternatives

b. Consider Def's interests in having trial concluded in a single proceeding

c. Ensure record reflects adequate basis for finding manifest necessity

B. Mistrial manifestly necessary when

St v Mink
146 Wis. 2d 1
(Ct. App. 1988)

1) Hung jury

a. *See also* **CR 24, Sec. 9**

St v Alvarado
2017 WI App 53, ¶¶ 13–15, 377 Wis. 2d 710

b. Note from jury during deliberations suggesting jury has concluded that State failed to prove one of charges does not prohibit retrial of that charge; although jury's opinion may seem firm, it is not final as long as jury is free to reconsider its opinion, and does not constitute verdict

St v Williams
2004 WI App 56, ¶ 31 & n3
270 Wis. 2d 761

2) Improper conduct of Def or counsel provokes mistrial and there is no alternative

St v Green
2023 WI 57
408 Wis. 2d 248
cert denied
144 S. Ct. 578 (2024)

3) Def's introduction of prejudicial evidence, not yet ruled admissible by Ct, and there is no alternative

C. Mistrial not manifestly necessary—and retrial barred—when Def objects to mistrial and:

St v Copening
100 Wis. 2d 700 (1981)
St v Jaimes
2006 WI App 93
292 Wis. 2d 656

1) State seeks mistrial to gain unfair advantage over Def or to avoid acquittal

St v Barthels
174 Wis. 2d 173 (1993)
limited on other grds by
St v Seefeldt
2003 WI 47
261 Wis. 2d 383

2) Prosecutor knows before trial that key witness is not able to appear but does not notify Ct until after jury sworn

St v Mattox
2006 WI App 110
293 Wis. 2d 840
St v Harp
2005 WI App 250
288 Wis. 2d 441

D. Ct's reasoning for granting mistrial is in error, for example, faulting Def for calling undisclosed alibi witness when witness called by Def was not alibi witness, or finding that contemptible behavior of Def counsel necessitated mistrial when counsel's behavior was not contemptible

St v Moeck
2005 WI 57, ¶¶ 37, 43
280 Wis. 2d 277
St v Seefeldt
2003 WI 47
261 Wis. 2d 383
St v Troka
2016 WI App 35, ¶¶ 28–32, 369 Wis. 2d 193

E. Mistrial is not manifestly necessary if reasonable alternative to mistrial is available, such as continuance or curative instruction

St v Copening
100 Wis. 2d 700 (1981)
St v Jaimes
2006 WI App 93, ¶¶ 7–8
292 Wis. 2d 656
St v Bunch
191 Wis. 2d 501, 507
(Ct. App. 1995)

F. In general, manifest necessity test does not apply, and Double Jeopardy Clause does not bar retrial, when Def successfully moves for mistrial based on reasons other than prosecutorial overreaching or laxness

CR 36
OTHER TRIAL PROBLEMS

1. Last-Minute Motions for Adjournment ..... CR 36-3
2. Stipulation by Def to Element of Crime ..... CR 36-3
3. Motion to Dismiss at Close of State's Case ..... CR 36-4
4. Colloquy with Def about Testifying or Not Testifying ..... CR 36-4
5. Motion to Dismiss at Conclusion of All the Evidence ..... CR 36-5
6. Questioning by the Court ..... CR 36-5
7. Sidebar Conferences ..... CR 36-5

1. Last-Minute Motions for Adjournment

St v Wright
2003 WI App 252, ¶ 49
268 Wis. 2d 694

A. Ct has discretion whether to adjourn

B. Witness unavailability

St v Fink
195 Wis. 2d 330, 339–40
(Ct. App. 1995)

1) 3 factors to consider

a. Actual surprise that could not have been foreseen

b. Whether contradictory or impeaching evidence can be obtained within a reasonable time

c. Whether denial of adjournment will be prejudicial

C. Def's request for new counsel, *see* CR 3, Counsel

2. Stipulation by Def to Element of Crime

St v Wallerman
203 Wis. 2d 158
(Ct. App. 1996)
overruled in part by
St v Veach
2002 WI 110, ¶ 124
255 Wis. 2d 390

A. When Def offers to concede element of offense to avoid introduction of other acts evidence (referred to as *Wallerman* stipulation), Ct and State have discretion whether to accept such concession, even if stipulation complies with *Wallerman* four-part test

Old Chief v US
117 SCt 644, 647 (1997)
St v Veach
2002 WI 110, ¶124
255 Wis. 2d 390

B. When evidence of prior conviction is necessary *solely* to prove element of prior conviction (a Def's status), Ct and State cannot refuse Def's offer to concede prior conviction

St v Alexander
214 Wis. 2d 628, 651
(1997)

Same rule applies in OWI context for evidence of Def's prior convictions, revocations, or suspensions under § 343.307(1)

972.10(4)

3. Motion to Dismiss at Close of State's Case

St v Duda
60 Wis. 2d 431, 439 (1973)
St v Scott
2000 WI App 51, ¶ 12
234 Wis. 2d 129

A. Motion must be denied if, considering State's evidence in the most favorable light, the evidence adduced, believed, and rationally considered, is sufficient to prove guilt beyond a reasonable doubt

St v Scott
2000 WI App 51, ¶ 9
234 Wis. 2d 129

B. Ct should not reserve ruling, but should decide motion before Def decides whether to present evidence

St v Gebarski
90 Wis. 2d 754 (1979)

C. Def waives right to challenge denial of motion on appeal if Def introduces additional evidence; if Def presents evidence, sufficiency of the evidence is determined on all the evidence presented, not just the State's

4. Colloquy with Def about Testifying or Not Testifying

Rock v Arkansas
107 SCt 2704 (1987)

A. Def has due process and 6th Amendment right to testify

St v Weed
2003 WI 85, ¶ 43
263 Wis. 2d 434

B. Ct must conduct colloquy with Def to determine whether

1) Def aware of right to testify

2) Def discussed right with counsel

St v Weed
2003 WI 85, ¶ 42
263 Wis. 2d 434

C. Record must support knowing, intelligent, and voluntary waiver

St v Garcia
2010 WI App 26
323 Wis. 2d 531

D. Failure to conduct colloquy requires evidentiary hearing to determine whether waiver was valid

972.10(4)

5. Motion to Dismiss at Conclusion of All the Evidence

St v Kelley
107 Wis. 2d 540 (1982)

Same standard applies as on a motion to dismiss at the close of the State's case, but Ct considers all the credible evidence, not just the State's

6. Questioning by the Court

St v Carprue
2004 WI 111
274 Wis. 2d 656

Trial Ct may ask questions to clarify, not to advocate

7. Sidebar Conferences

A. Appellate courts discourage sidebar conferences, if no contemporaneous record is made

St v McDowell
2003 WI App 168
266 Wis. 2d 599
aff'd, 2004 WI 70
272 Wis. 2d 488
St v Mainiero
189 Wis. 2d 80
(Ct. App. 1994)

Recommendation

If contemporaneous record cannot be made during sidebar conference, at first opportunity afterwards, outside presence of jury, Ct should summarize conference and ask counsel whether summary is correct

CR 37: THE SENTENCING HEARING

1. Conducting the Hearing ..... CR 37-1
2. Habitual Criminality (Repeater) Penalties ..... CR 37-4
3. Persistent Repeater ..... CR 37-6
4. Exercising Sentencing Discretion ..... CR 37-6
5. Read-Ins ..... CR 37-12
6. Presentence Reports ..... CR 37-13
7. Stating Sentencing Decision Reasons ..... CR 37-15
8. Pronouncing Sentence for Felonies Committed After 12/31/99 and Misdemeanors Committed After 2/1/03 ..... CR 37-17
9. Sentence Credit ..... CR 37-19
10. Restitution ..... CR 37-22
11. Judgment of Conviction ..... CR 37-29
12. Notice of Right to Appeal ..... CR 37-30
13. Stay of Execution ..... CR 37-30
14. Return of Seized Property ..... CR 37-31
15. Reconfinement ..... CR 37-31

Wis JI-Cr SM-34

1. Conducting the Hearing

Wis Const art I, § 9m
§ 972.14(2m)
§ 950.04(1v)(L), (m)

A. Ct must inquire whether DA complied with consultation requirements of victims' rights law (*See* CR 1)

§ 971.04(1)(g)
§ 967.08
St v Koopmans
202 Wis. 2d 385
(Ct. App. 1996)
aff'd 210 Wis. 2d 670
(1997)

B. Def must be present or any party can petition the Ct to appear by telephone or live audiovisual means

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

But Def may waive by conduct, e.g., refusing to leave jail despite Ct's warning it will proceed

C. Def has right to counsel

D. Establish repeater status, see Secs. 2 and 3 below

E. Determine restitution, see Sec. 10 below

§ 972.15(2)
St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

F. PSI must be available to DA, Def, and Def's Atty before sentencing; thereafter confidential

1) Ask for corrections, additions, deletions

2) See Sec. 6 below

§ 972.14(2)

G. DA, Def's Atty, and Def may make statement on any matter relevant to the sentence

§ 972.14(3)

H. Statements by others

Wis Const art I, § 9m
§ 950.02(4)(a)4.

1) Ct shall allow victim or family member of deceased victim to make statement or submit written statement to be read in Ct

§ 895.45(2)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

2) Ct may allow others, including a service representative in cases involving abusive conduct, to make or submit statements

3) All statements must be relevant to sentencing

Wis Const art I, § 9m
St v Payette
2008 WI App 106, ¶¶ 51–59, 313 Wis. 2d 39

4) Ct may restrict Def's view of victim

St v Matson
2003 WI App 253
268 Wis. 2d 725

5) Investigating officer breaches plea agreement by requesting longer sentence than DA

St v Stewart
2013 WI App 86
349 Wis. 2d 385

6) Wounded officer speaking as victim does not breach plea agreement

SCR 60.04(1)(g) & cmts
Wis Judicial Comm'n v Piontek
2019 WI 51
386 Wis. 2d 703

I. Judge to consider all information properly presented on notice with opportunity to be heard

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

J. Quasi-administrative setting in which many trial-like procedural safeguards do not apply

St v Scherreiks
153 Wis. 2d 510
(Ct. App. 1989)

1) Rules of evidence (other than Ch 905 privileges) do not apply to sentencing

St ex rel Le Febre v Israel
109 Wis. 2d 337 (1982)
St v Norton
2001 WI App 245
248 Wis. 2d 162

2) Def has due-process right to be sentenced on basis of accurate information

St v Rush
147 Wis. 2d 225
(Ct. App. 1988)

3) Exclusionary rule not applicable

§ 972.14(2)

K. Ct must inquire of Def why sentence should not be pronounced

L. Exercise discretion, see Sec. 4, below

St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

M. Pronounce judgment and impose sentence, see Sec. 7, below

§ 973.017(10m)(b)
St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

N. State reason for sentencing decision in open court. *See* Sec. 7 below

1) Unless Ct determines not in Def's interest to state reasons in Def's presence

2) If not stated in open court, reasoning must be in writing

§ 973.176(1)

O. Inform convicted felon of prohibition against possession of firearm and of consequences

§ 973.0335

P. Inform convicted felon of prohibition against possession of body armor and of consequences if conviction is for violent felony as described in § 941.291(1)(b)

Q. Award or deny sentence credit, see Sec. 9 below

§ 973.047(1f)

R. Upon any criminal conviction, DNA sample required, if not already on file with DOJ

§ 165.77(4)

Inform Def of right to request expungement if conviction reversed, set aside, or vacated

§ 973.12(1)

2. Habitual Criminality (Repeater) Penalties

§ 939.62
St v Hopkins
168 Wis. 2d 802 (1992)
St v Wittrock
119 Wis. 2d 664 (1984)

A. Enhancer requires a felony conviction or 3 misdemeanor convictions in 5 years preceding current crime, excluding time in actual confinement serving a sentence

1) "Serving a sentence" includes time spent on a parole hold

§ 939.62(3)(a)

2) Convictions under Chs 341–349 cannot be used as basis for enhancement

St v Delaney
2003 WI 9
259 Wis. 2d 77

3) Crimes under Chs 341–349 can be enhanced by convictions not under Chs 341–349

St v Farr
119 Wis. 2d 651 (1984)
St v Hill
2016 WI App 29
368 Wis. 2d 243

B. Repeater status under § 973.12(1) must be established by personal admission of Def or by evidence at sentencing hearing before imposition of sentence (if not established at plea hearing)

Recommendation
St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

1) Trial Judge to ask Def whether Def admits to repeater allegations

St v Liebnitz
231 Wis. 2d 272 (1999)
St v Hill
2016 WI App 29
368 Wis. 2d 243

a. Finding of admission of repeater status by Def may be based on totality of record

§ 973.12(1)
St v Farr
119 Wis. 2d 651 (1984)

2) If Def does not admit to repeater allegations, repeater allegations may be proved

a. By official report of governmental agency, including PSI and judgment of conviction with detail on dates of conviction and/or confinement

§ 346.65(2)
St v Wideman
206 Wis. 2d 91 (1996)

b. In OWIs, by certified copy of conviction or other competent proof, including admission of prior offense by Atty for Def

St v Flowers
221 Wis. 2d 20
(Ct. App. 1998)

c. In sentencing after revocation, revocation summary is prima facie evidence of actual time of incarceration

St v Saunders
2002 WI 107
255 Wis. 2d 589

d. Uncertified copy of prior judgment of conviction may suffice, but certified judgment of conviction remains best evidence

- CCAP report (from WCCA website) may not be used

St v Bonds
2006 WI 83
292 Wis. 2d 344

Witte v US
115 S. Ct. 2199 (1995)

C. Enhanced penalties for habitual criminality do not violate double jeopardy as additional penalties for earlier offense

St v Block
222 Wis. 2d 586
(Ct. App. 1998)
St v Lindsey
203 Wis. 2d 423
(Ct. App. 1996)

D. 3-strikes law is not cruel and inhuman and does not abridge separation of powers or violate equal protection, nor is it arbitrary in creating a class of offenses

St v Radke
2002 WI App 146
256 Wis. 2d 448,
aff'd, 2003 WI 7
259 Wis. 2d 13

E. 2-strikes child sex offense law (§ 939.62(2m)) does not offend substantive due process

§ 939.62
§ 973.12(2)
St v Harris
119 Wis. 2d 612 (1984)
St v Upchurch
101 Wis. 2d 329 (1981)

F. Habitual criminality (repeater) statutes do not authorize Ct to impose 2 separate sentences for one offense; impermissible to impose one regarding the offense and the other regarding the repeater status

St v Harris
119 Wis. 2d 612 (1984)

1) Sec. 939.62 inapplicable unless Trial Ct seeks to impose sentence greater than maximum permitted for a first offender

St v Martin
162 Wis. 2d 883 (1991)

G. Repeater allegation cannot be added after Def has entered not guilty plea to complaint or information that does not contain repeater allegation

St v Caldwell
154 Wis. 2d 683
(Ct. App. 1990)

1) If repeater allegation in complaint, it need not reappear in information

St v Wimmer
152 Wis. 2d 654
(Ct. App. 1989)

H. "Prior conviction" for purposes of enhanced penalty provisions occurs upon finding of guilty, even before sentencing

St v Bush
185 Wis. 2d 716
(Ct. App. 1994)

I. Calculation of enhancement time for attempt equals ½ sentence for the crime as if completed, plus enhancer

§ 973.01(2)(c)
St v Lasanske
2014 WI App 26
353 Wis. 2d 280

§ 973.01(2)(c)
St v Hailes
2023 WI App 29
408 Wis. 2d 465
pet for rev denied

J. Enhancer increases term of confinement of felony and overall length of enhanced misdemeanor (But § 973.01(2)(c)1. not applicable to misdemeanors)

K. Repeat criminality (§ 939.62) or second or subsequent drug offense (§ 961.48) enhancer can be applied, but not both

§ 939.62(2m)

3. Persistent Repeater

St v Collins
2002 WI App 177
256 Wis. 2d 697

A. Ct must make own finding that out-of-state crime is comparable to Wis serious felony

4. Exercising Sentencing Discretion

A. Proper considerations

§ 973.017
St v Gallion
2004 WI 42
270 Wis. 2d 535
St v JEB
161 Wis. 2d 655
(Ct. App. 1991)

St v Bolstad
2021 WI App 81
399 Wis. 2d 815

1) Court must consider and explain each on the record

   a. Gravity of offense

   b. Character of offender

   c. Need to protect public

§ 973.017(2)

2) For felonies committed on or after 2/1/03, Ct must consider

   § 973.017(2)(ad) a. Protection of the public

   § 973.017(2)(ag) b. Gravity of the offense

   § 973.017(2)(ak) c. Def's rehabilitative needs

   § 973.017(2)(b) d. Aggravating and mitigating factors

Bastian v St
54 Wis. 2d 240 (1972)

3) Probation to be disposition, unless

   a. Confinement necessary to protect public from further criminal activity of Def

b. Offender needs correctional treatment available only if confined (community rehabilitation services exhausted)

c. Undue depreciation of seriousness of crime if probation granted

4) Other factors

a. Read-ins, see **Sec. 5.**, below

b. PSI, see **Sec. 6.**, below

St v Von Loh
157 Wis. 2d 91
(Ct. App. 1990)

c. History of criminal offenses, including pending charges

St v Frey
2012 WI 99
343 Wis. 2d 358
St v Leitner
2002 WI 77
253 Wis. 2d 449
St v Von Loh
157 Wis. 2d 91
(Ct. App. 1990)

d. History of undesirable behavior patterns, including dismissed, uncharged, or unproven offenses or facts underlying expunged offenses, and including conduct for which Def was acquitted, if relevant

St v Schordie
214 Wis. 2d 229
(Ct. App. 1997)

e. Acts resulting in probation revocation, even if they result in convictions upon which sentences are separately imposed

f. Def's personality, character, and social traits

g. Vicious or aggravated nature of crime

h. Degree of Def's culpability

i. Def's demeanor at trial and truthfulness

j. Def's age, educational background, and employment record

St v Williams
2018 WI 59
381 Wis. 2d 661

k. Def's remorse, repentance, and cooperativeness

l. Def's need for close rehabilitative control

m. Rights of public

§ 972.14(3)(a)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

n. Recommendations of interested parties, including victims and family members of homicide victims

Wis Const art I, § 9m
St v Spears
220 Wis. 2d 720
(Ct. App. 1998), *aff'd*,
227 Wis. 2d 495 (1999)

St v Gallion
2002 WI App 265
258 Wis. 2d 473,
aff'd, 2004 WI 42
270 Wis. 2d 535

St v Jones
151 Wis. 2d 488
(Ct. App. 1989)

§ 972.15(2s)
St v Crowe
189 Wis. 2d 72
(Ct. App. 1994)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

St v Kuba
150 Wis. 2d 618
(Ct. App. 1989)

Dawson v Delaware
112 S. Ct. 1093 (1992)

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

St v Armstrong
2014 WI App 59
354 Wis. 2d 111
see St v Gallion
2004 WI 42, ¶ 43 n11
270 Wis. 2d 535

St v Counihan
2020 WI 12
390 Wis. 2d 172

St v Loomis
2016 WI 68, ¶ 88
371 Wis. 2d 235

o. If victims or their relatives present information regarding victim's good character, Def may present victim's criminal record

- Victim's character, good or bad, may be relevant

p. Rehabilitative needs of victim

q. History of Juv delinquency adjudications and contacts short of adjudication

r. Length of time needed to complete restitution is factor in determining length of probation

s. Political beliefs, if relevant

t. Sentences of co-Defs

u. Length of pretrial detention or sentence credit, so long as not for purpose of depriving Def of sentence credit

v. Other sentences imposed in similar cases

w. Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment relevant to (1) identifying alternatives to prison for low-risk offenders; (2) assessing whether Def can be supervised safely and effectively in the community; and (3) imposing terms and conditions of supervision, and responses to violations

- Caution: COMPAS risk assessment cannot be a determinative factor at sentencing, i.e., to determine whether offender is incarcerated

St v Loomis
2016 WI 68, ¶ 68
371 Wis. 2d 235

St v Loomis
2016 WI 68, ¶ 74
371 Wis. 2d 235

- Caution: Ct must consider that COMPAS merely identifies groups of high-risk offenders, not any one particular high-risk individual

St v Loomis
2016 WI 68, ¶¶ 93–95
371 Wis. 2d 235

- Caution: COMPAS risk assessment may not be used as an aggravating or mitigating factor in determining severity of the sentence, nor to determine the gross length of sentence

St v Loomis
2016 WI 68, ¶ 99
371 Wis. 2d 235

- Caution: Ct must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed

St v Samsa
2015 WI App 6, ¶ 13
359 Wis. 2d 580

- Note: Ct may accept portions of COMPAS assessment and reject others

St v CVC
153 Wis. 2d 145
(Ct. App. 1989)

5) Weight given each relevant factor particularly within wide discretion of Trial Ct

   a. Erroneous exercise of discretion when sentence excessive and unusual and so disproportionate to offense committed as to shock public sentiment

   b. Erroneous exercise of discretion when sentence violates judgment of reasonable people concerning what is right and proper under circumstances

St v Panknin
217 Wis. 2d 200
(Ct. App. 1998)

6) Not a violation of due process or public records law to deny access to Judge's personal notes made in preparation for or during sentencing

§ 973.046(1r)(a)
St v Williams
2018 WI 59
381 Wis. 2d 661
St v Cox
2018 WI 67
382 Wis. 2d 338
St v Scruggs
2017 WI 15
373 Wis. 2d 312

7) Ct must impose DNA surcharge

   a. Must be applied to every count of conviction

   b. This requirement deemed not ex post facto

§ 973.055

8) Domestic abuse surcharge is mandatory, but Ct may waive all or part of it if it causes a "negative impact" on Def's family

B. Improper considerations

Scales v St
64 Wis. 2d 485 (1974)

1) Refusal to testify at sentencing hearing

Williams v St
79 Wis. 2d 235 (1977)

2) Exercise of constitutional rights

St v Goodson
2009 WI App 107
316 Wis. 2d 598
St v JEB
161 Wis. 2d 655
(Ct. App. 1991)

3) Preconceived sentencing policy, e.g., "I never give probation for this type of offense...." or "If revoked, you'll get the max!"

St v Tarantino
157 Wis. 2d 199
(Ct. App. 1990)

4) Ct not required to take ABA guidelines into consideration

St v Armstong
2014 WI App 59
354 Wis. 2d 111

5) Length of pretrial detention or sentence credit for purpose of depriving Def of sentence credit

Scales v St
64 Wis. 2d 485 (1974)
St v Carrizales
191 Wis. 2d 85
(Ct. App. 1995)

6) Def's refusal to acknowledge guilt as only or primary factor

   a. Acknowledgment of guilt may be viewed as positive factor

St v Fuerst
181 Wis. 2d 903
(Ct. App. 1994)

7) Lack of religious convictions, failure to attend church

St v Betters
2013 WI App 85
349 Wis. 2d 428

8) Judge's own religious beliefs

St v Peebles
2010 WI App 156
330 Wis. 2d 243

9) Admission of wrongdoing made during treatment as condition of probation

St v Alexander
2015 WI 6
360 Wis. 2d 292

10) Admission in compelled statement to probation/parole agent

St v Salas Gayton
2016 WI 58, ¶¶ 25–35
370 Wis. 2d 264

11) Def's nationality or immigration status, except to the extent it bears on permissible factors, e.g., prior disregard for the law, whether community supervision is a realistic option, etc.

C. Imposing concurrent or consecutive sentences

§ 973.15(2)(a)

1) A sentence may be concurrent with or consecutive to any other sentence imposed at the same time or previously

St v Szulczewski
209 Wis. 2d 1
(Ct. App. 1997)
rev'd on other grounds
216 Wis. 2d 495 (1998)
St v Harr
211 Wis. 2d 584
(Ct. App. 1997)

a. A sentence may be concurrent with or consecutive to an NGI commitment in another case

- Ct must determine whether NGI commitment constitutes "legal cause" to stay sentence

St v Anderson
163 Wis. 2d 342
(Ct. App. 1991)

2) Whether to impose concurrent or consecutive sentences rests within discretion of Ct

a. No specific guidelines adopted in Wis

St v Lipke
186 Wis. 2d 358
(Ct. App. 1994)

b. Ct should indicate whether concurrent or consecutive

St v LaTender
86 Wis. 2d 410 (1979)

3) Same factors that apply to length of sentence also apply to whether sentences will run consecutively

a. Gravity of offense

b. Character of Def

c. Need to protect public

St v Strohbeen
147 Wis. 2d 566
(Ct. App. 1988)

4) Sentence may be made consecutive to commitment for failure to pay fines or forfeitures

§ 973.15(2), (3)
St v Toy
125 Wis. 2d 216
(Ct. App. 1985)

5) Consecutive sentences can be consecutive to earlier imposed sentence or earlier federal or out-of-State sentence

St v Thompson
208 Wis. 2d 253
(Ct. App. 1997)

6) Sentence of confinement is permissible consecutive to sentence imposed and stayed

St v Oglesby
2006 WI App 95
292 Wis. 2d 716

7) Second sentence is presumed concurrent in absence of statute or judicial declaration to the contrary

St v Coles
208 Wis. 2d 328
(Ct. App. 1997)

8) If unclear whether sentence is concurrent or consecutive, consider intent of Ct and entire record

D. Imposing sentence after revocation of probation

St v Reynolds
2002 WI App 15
249 Wis. 2d 798

1) If Judge other than original sentencing Judge presides, s/he must acquaint self with trial testimony, PSI, and original sentencing rationale

St v Jones
2005 WI App 259
288 Wis. 2d 475

a. Not necessary in reconfinement hearing

5. Read-Ins

A. DA may stipulate with Def to read additional uncharged or dismissed offenses into record

St v Frey
2012 WI 99
343 Wis. 2d 358
Mallon v St
49 Wis. 2d 185 (1970)

1) DA agrees not to prosecute those offenses

2) Ct may consider those offenses in imposing sentence upon conviction of charged offense

3) Should be read in on record

Austin v St
49 Wis. 2d 727 (1971)
ABA Stds—Pleas of Guilty § 14–3.3 (1999)

St v Straszkowski
2008 WI 65
310 Wis. 2d 259
St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

4) Read-ins are not admissions by Def that he or she committed read-in offenses and should not be deemed so

St v Szarkowitz
157 Wis. 2d 740
(Ct. App. 1990)

a. State prohibited from later charging Def with read-ins

RWS v St (In Int of RWS)
162 Wis. 2d 862 (1991)

5) Ct may impose a more severe sentence for convicted offenses based on read-in offenses

6) May not be used as prior convictions under repeater statute

St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

7) May be included in restitution order if so stipulated. *See* **Sec. 10** below

Recommendation

8) For clear understanding of Ct, counsel, and Def, read-ins should be reduced to writing and submitted to Ct on separate document

   Include underlying facts

§ 973.042(2)
St v Schmidt
2021 WI 65
397 Wis. 2d 758

9) Read-in child pornography charges may be counted when imposing the $500 per-image surcharge

St v Jones
2021 WI App 15
396 Wis. 2d 602

10) Bond posted for a dismissed complaint or a dismissed but read-in complaint with no restitution must be returned in full and cannot be used for restitution, fines, or costs in a separate complaint

Recommendation
St v Straszkowski
2008 WI 65
310 Wis. 2d 259

B. In plea colloquy, Ct should establish that Def acknowledges responsibility for read-ins, that read-ins may be considered in sentencing, and that Def accepts responsibility for restitution regarding read-ins

6. Presentence Reports

§ 972.15(1)
St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

A. May be ordered in Ct's discretion in all felonies and in certain specified misdemeanors

Comment

1) DOC may, upon Ct request, prepare PSI in misdemeanor in which Def is subject to prison term because of repeater status

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

B. Def has due-process right to read PSI before sentencing notwithstanding § 972.15(2)

§ 972.15(3)

1) Ct may preserve confidential identity of any person who provides information

   a. Ct should state on record what information withheld and why

St v Skaff
152 Wis. 2d 48
(Ct. App. 1989)

St v Perez
170 Wis. 2d 130
(Ct. App. 1992)

2) No right to have counsel present during Def's presentence interview

St ex rel Oliver v Guolee
179 Wis. 2d 376
(Ct. App. 1993)

3) Def's Atty has right to PSI on § 974.06 motion

§ 972.15(4)

C. PSI shall be confidential after sentencing and may be released only upon specific authorization of the Ct, EXCEPT:

§ 972.15(4m)
St ex rel SPD v Ct of Appeals (In re St v Buchanan)
2013 WI 31
346 Wis. 2d 735

1) DA and Defense counsel may have and keep copy of PSI

§ 972.15(4m)

St v Parent
2006 WI 132
298 Wis. 2d 63

2) Self-represented Def may view PSI

   a. Includes right to review PSI to refute no-merit report

§ 972.15(4r)

3) Victim may view all sentencing recommendations in the PSI and any portion of the PSI that contains information pertaining to the victim

§ 972.15(5)

4) DOC may use PSI for correctional programming, parole consideration, or care and treatment of any person sentenced to imprisonment or intensive sanctions program, placed on probation, released on parole or ES, or committed to DOC under Ch 51 or Ch 971, or any other person in DOC custody, or for research purposes

§ 972.15(6)

5) DOC, DHS, Def, Def's Atty, DA, examining physician or mental health professional, Ct, and jury may use PSI in Ch 980 (sexual predator) proceeding

D. Correcting errors in PSI

St v Melton
2013 WI 65
349 Wis. 2d 48

1) Errors in PSI should be corrected as part of Def's due-process right to be sentenced based on correct information

   a. Def has right to evidentiary hearing

   b. Recommendation: Note corrections (whether agreed or found) on the record and order the corrections be attached to all copies of the PSI

St v Bush
185 Wis. 2d 716
(Ct. App. 1994)
St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

2) Def waives objection to incorrect information in PSI by not correcting information at time of sentencing or at hearing on motion to modify

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

3) Not erroneous exercise of discretion to rely on uncontested facts in PSI

7. Stating Sentencing Decision Reasons

A. Ct must

St v Gallion
2004 WI 42
270 Wis. 2d 535
St v Ziegler
2006 WI App 49
289 Wis. 2d 594

1) Specify objectives of sentence, among which may be

a. Protection of community

b. Punishment of Def

c. Rehabilitation of Def

d. Deterrence of others

St v Whitaker
2022 WI 54
402 Wis. 2d 735

2) Describe relevant facts and their nexus to objectives

3) Describe factors considered (*see* **Sec. 4.A.**4) above)

4) Impose minimum amount of custody or confinement consistent with protection of public, gravity of offense, and Def's rehabilitation

5) Explain why duration of sentence or conditions of supervision advance the sentence's objectives

§ 973.176

6) Give the following admonitions in felony cases

a. Firearm prohibition and penalty

b. Voting prohibition

c. Child sex offender working with children

§ 973.0335

d. If violent felony (§ 941.291(1)(b)), body armor prohibition and penalty

§ 973.049(3)

7) In any case with a no-contact condition under § 973.049, Ct must include the prohibition in the judgment of conviction

§ 949.12(1m)
§ 939.617
St v Brott
2023 WI App 45
409 Wis. 2d 96
pet for rev denied

8) Impose mandatory minimum term of initial confinement of three years for child pornography under § 949.12(1m) and § 939.617

B. Improper sentences

Edelman v St
62 Wis. 2d 613 (1974)

1) Ct has no authority to set minimum term

St v Foellmi
57 Wis. 2d 572 (1973)

2) Ct may not sentence with mental reservation to review sentence to determine effect of imprisonment

Scott v St
64 Wis. 2d 54 (1974)

3) Ct has no authority to increase sentence based solely on reflection

St v Burt
2000 WI App 126
237 Wis. 2d 610

a. But Ct can correct concurrent/consecutive error on same day, resulting in increased sentence

St v Willett
2000 WI App 212
238 Wis. 2d 621

b. Ct cannot correct concurrent/consecutive mistake of law 4 months later

St v Gibbons
71 Wis. 2d 94 (1976)

4) Ct cannot specify conditions of prison incarceration

§ 973.09(1)(d)
St v Eckola
2001 WI App 295
249 Wis. 2d 276

5) Jail for less than the mandatory or presumptive minimum time period as a condition of probation

St v Shirikian
2023 WI App 13
406 Wis. 2d 633
pet for rev denied

6) Statute calling for mandatory bifurcated sentence requires term of initial confinement in prison that cannot be imposed and stayed or withheld

St v Gruetzmacher
2004 WI 55
271 Wis. 2d 585

7) Ct's ability to correct error turns on Def's expectation of finality in sentence. No per se double jeopardy rule

8. Pronouncing Sentence for Felonies Committed After 12/31/99 and Misdemeanors Committed After 2/1/03

A. Pronouncing a bifurcated sentence—not life sentence

§ 973.01(1)

1) Required for any felony committed on or after December 31, 1999, and any misdemeanor committed on or after February 1, 2003

2) Total sentence length = Period of initial confinement + period of ES

§ 973.01(2)(d)

a. For all offenses, ES must be greater than 25% of period of initial confinement, except

§ 973.01(2)(d)1.–6.

- Classified felonies (Class B through Class I) also have maximum terms specified by statute

§ 973.01(2)(b)10.

b. For all offenses (except for specified classified felonies or punishable attempt to commit classified felony), period of confinement must not be more than 75% of the total length of sentence

- Example: 5th offense OWI, maximum of 5 years, confinement must be no more than 3.75 years

RMC Form CR-234

3) Ct must inform Def in writing of following

§ 973.01(8)(a)1.

a. Total sentence length

§ 973.01(8)(a)2.

b. Initial period of confinement

§ 973.01(8)(a)3.

c. Length of ES

§ 973.01(8)(a)4., § 302.113(3)

d. Bad time consequences

- Length of confinement time will be increased. ES time will be decreased accordingly

e. Segregation consequences

f. Consequences of frivolous civil suit or false evidence

§ 973.01(8)(a)5.

g. Consequences of violating ES

- Return to confinement for up to balance of total sentence. No credit for street time

§ 302.045(2),
§ 973.01(8)(am)
St v Steele
2001 WI App 160
246 Wis. 2d 744

St v Lehman
2004 WI App 59
270 Wis. 2d 695

h. Eligibility for Challenge Incarceration Program (CIP) (boot camp)

- Ct may order portion of sentence served before CIP

§ 973.01(8)(ag)
§ 302.05

St v White
2004 WI App 237
277 Wis. 2d 580

St v Gramza
2020 WI App 81
395 Wis. 2d 215

i. Eligibility for Earned Release Program (ERP)/ Substance Abuse Program (SAP)

- Ct may order portion of sentence served before ERP

- Def must serve mandatory minimum period of confinement despite completing SAP

§ 973.01(5)
St v Larson
2003 WI App 235
268 Wis. 2d 162

4) Ct may impose conditions of ES

a. Conditions may not include confinement

St v Rowan
2012 WI 60
341 Wis. 2d 281
see also Samson v Calif
126 S. Ct. 2193 (2006)

b. Conditions of ES may impinge on constitutional rights as long as the conditions are not overly broad and are reasonably related to Def's rehabilitation

St v *Hoppe*
2014 WI App 51
354 Wis. 2d 219

c. "No drive" condition may not exceed maximum period of revocation under Ch 343

d. *See also* **Conditions of Probation, CR 38, Sec. 4.D.**

B. Pronouncing a life sentence

1) Impose sentence

2) Determine ES eligibility. Three options:

§ 973.014(1g)(a)1.

a. ES eligibility in 20 years

§ 973.014(1g)(a)2.

b. ES eligibility at some date later than 20 years

§ 973.014(1g)(a)3.

c. No ES eligibility

§ 973.014(1g)(b)
§ 302.114(3)–(5)
RMC Form CR-235

3) Ct must inform Def of

a. Bad time consequences

- Length of confinement time will be increased. ES time will be decreased accordingly

b. Segregation consequences

c. Consequences of frivolous civil suit or false evidence

d. Procedure for petitioning for release to ES

St v Volk
2002 WI App 274
258 Wis. 2d 584

C. Imposing a sentence with enhancer(s)

1) Enhancer applies only to period of confinement

§ 973.155
Wis JI-Cr SM-34A

9. Sentence Credit

Recommendation

A. Ct should make specific finding of number of days' credit in judgment of conviction

St v Villalobos
196 Wis. 2d 141
(Ct. App. 1995)

1) Def has burden of showing connection between custody and conduct for which sentence imposed

St v Magnuson
2000 WI 19
233 Wis. 2d 40

2) Offender's status constitutes custody for credit purposes when offender subject to escape charge for leaving that status

St v Carter
2010 WI 77
327 Wis. 2d 1
St v Boettcher
144 Wis. 2d 86 (1988)
Klimas v St
75 Wis. 2d 244 (1977)

B. Credit given for time in custody in connection with course of conduct for which Def sentenced, including time spent unable to make bail

1) Awaiting trial

St v Trepanier
2014 WI App 105
357 Wis. 2d 662

a. Credit granted for sentence on criminal offense even if Def also in custody for civil contempt with right to purge, DESPITE Ct ordering sentence consecutive to contempt

2) Being tried

3) Awaiting sentence

St v Boettcher
144 Wis. 2d 86 (1988)
St v Thomas
2021 WI App 59
399 Wis. 2d 165

4) On probation or parole hold (whether federal or state) for same course of conduct as that resulting in conviction in question, if concurrent sentence is imposed

St v Baker
179 Wis. 2d 655
(Ct. App. 1993)

5) Secure custody pending waiver hearing credited against sentence

St v Thompson
225 Wis. 2d 578
(Ct. App. 1999)

6) Secure custody following Juv commitment for violation of aftercare supervision, even though arising out of same course of conduct

St v Gilbert
115 Wis. 2d 371 (1983)

7) Def entitled to credit for time spent in jail as condition of probation

St v Johnson
2009 WI 57
318 Wis. 2d 21

8) Amount of credit granted on concurrent sentences not necessarily equal. Compute credit for each "course of conduct" separately

St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

9) Def who receives conditional jail time equal to minimum mandatory sentence is entitled to good time credit

St v Carter
2010 WI 77
327 Wis. 2d 1

10) Def entitled to credit for time held in other state on executed Wis warrant and other state probation violation warrant until other state sentence imposed if Wis sentence later made concurrent

St v Zahurones
2019 WI App 57
389 Wis. 2d 69

11) A count subject to a deferred entry of judgment for the same course of conduct as sentencing-after-revocation counts shall be entitled to the same credit

§ 973.10(2)(b)
St v Slater
2021 WI App 88
400 Wis. 2d 93

12) Time spent in custody from probation or extended supervision hold until received by the prison

13) See also **Conditions of Probation, CR 38, Sec. 4**

St v Kontny
2020 WI App 30, ¶ 10
392 Wis. 2d 311
St v Johnson
2018 WI App 2
379 Wis. 2d 684

C. A day of sentence credit for each calendar day during which Def spent at least part of the day in custody

D. Credit not given

St v Kontny
2020 WI App 30, ¶ 12
392 Wis. 2d 311

1) The day of sentencing is not a day of credit

Wilson v St
82 Wis. 2d 657 (1978)
St v Wolfe
2001 WI App 66
242 Wis. 2d 426

2) If sentences consecutive, Def to receive credit on first sentence

St v Boettcher
144 Wis. 2d 86 (1988)

a. Even if sentence imposed is for crime that resulted in probation hold or triggered probation revocation

St v Rohl
160 Wis. 2d 325
(Ct. App. 1991)
St v Morrick
147 Wis. 2d 185
(Ct. App. 1988)

3) If sentences independent of each other and served at different times, dual credit not allowed

St v Beets
124 Wis. 2d 372 (1985)

4) Time served on sentence after revocation and before sentencing on revocation-triggering offense not to be credited against later sentence on revocation-triggering offense

St v Abbott
207 Wis. 2d 624
(Ct. App. 1996)

5) DIS confinement sanction not to be applied as credit against sentence on offense that triggered DIS sanction

St v Chapman
175 Wis. 2d 231
(Ct. App. 1993)

6) Life-means-life sentencing for crimes committed before Dec. 31, 1999, § 973.014(2) (now § 973.014(1)(b)), does not require presentence time credit against parole eligibility date

St v Seeley
212 Wis. 2d 75
(Ct. App. 1997)

7) Ct may deny sentence credit for presentence jail time when setting parole eligibility under § 973.014(1)(b) for crimes committed before Dec. 31, 1999

St v Cobb
135 Wis. 2d 181
(Ct. App. 1986)

8) Time spent in treatment as condition of probation not credited unless Def locked in at night

St v Pettis
149 Wis. 2d 207
(Ct. App. 1989)

9) Home detention as condition of bail does not count as "custody" and does not produce credit for time served

St v Villalobos
196 Wis. 2d 141
(Ct. App. 1995)
St v Demars
119 Wis. 2d 19
(Ct. App. 1984)

10) Unexecuted arrest warrant or detainer from another Cty on another offense not sufficient connection if Def is being held on other grounds

St v Johnson
2007 WI 107
304 Wis. 2d 318

11) Time in Juv institution that would have been ordered even if no new crime

St ex rel Baade v Hayes
2015 WI App 71
365 Wis. 2d 174

12) Good time earned on probationary condition time

St v Friedlander
2019 WI 22
385 Wis. 2d 633

13) Credit for time spent at liberty after mistakenly released from incarceration

St v Harrison
2020 WI 35
391 Wis. 2d 161

14) Incarceration for a prior vacated conviction and sentence that is not part of the same course of conduct

E. Def to receive day-for-day credit for all jail time against total incarceration for same course of conduct for which ultimately sentenced

St v Fermanich
2023 WI 48
407 Wis. 2d 693
St v Floyd
2000 WI 14
232 Wis. 2d 767

F. Credit given for confinement on charges dismissed and read in at sentencing

10. Restitution

A. General principles

§ 973.09(1)(b)
§ 973.20(1r)
St v Evans
2000 WI App 178
238 Wis. 2d 411

1) Required to be determined before imposing sentence or ordering probation

a. Unless Ct finds substantial reason not to order, stating reasons on record

St v Borst
181 Wis. 2d 118
(Ct. App. 1993)

b. Sentence is illegal unless restitution is ordered

St v Muth
2020 WI 65
392 Wis. 2d 578
St v Walters
224 Wis. 2d 897
(Ct. App. 1999)
St v Dugan
193 Wis. 2d 610
(Ct. App. 1995)

2) Restitution serves penal goals of rehabilitation, punishment, and deterrence

a. Advisement during plea colloquy not required

3) Can be in addition to any other penalty

§ 973.20(1r)
St v Cleaves
181 Wis. 2d 73
(Ct. App. 1993)

4) Permitted for read-ins

5) Payable to

§ 973.20(1r)

a. Victim or victim's estate

St v Hoseman
2011 WI App 88
334 Wis. 2d 415
St v Vanbeek
2009 WI App 37
316 Wis. 2d 527
St v Howard-Hastings
218 Wis. 2d 152
(Ct. App. 1998)

- "Victim" in § 973.20 includes direct victims of crime and may include governmental entities, and

St v Gahart
2022 WI App 61
405 Wis. 2d 375
St v Gribble
2001 WI App 227
248 Wis. 2d 409

- Parent, guardian, legal custodian of child victim, including minor passenger of a driver convicted of OWI with minor passenger offense

§ 973.20(5)(d)

b. Insurer or surety that has paid claim, if justice requires

St v Baker
2001 WI App 100
243 Wis. 2d 77

- Includes Medical Assistance

§ 973.20(9)(a)

c. Victim compensation fund

- Subordinate to claims of victims suffering loss

§ 973.20(11)(a)

6) Surcharge of 5% of amount of restitution imposed for administrative expenses

§ 973.20(10)(a)

7) Payment schedule set

a. Can be payable immediately, within specified time or in specified installments

b. Payment period cannot be longer than end of probation, parole, or extended supervision (ES)

c. Ct may order deduction of percentage of prison wages and gifts during initial confinement

St ex rel Ortiz v Carr
2022 WI App 16
401 Wis. 2d 450

Huml v Vlazny
2006 WI 87
293 Wis. 2d 169

8) Civil settlement does not affect enforcement of criminal restitution order unless double recovery would result. But civil settlement may bar enforcement of civil judgment converted from criminal restitution order

B. Restitution hearing

§ 973.20(13)(b)

1) DA must attempt to obtain information regarding amount of loss suffered by any victim as result of the crime

§ 973.20(13)(a)

2) Factors to be considered

a. Amount of loss suffered by victim(s)

b. Financial resources of Def

- Ct may not order liquidation of ERISA plan with anti-alienation clause

St v Kenyon
225 Wis. 2d 657
(Ct. App. 1999)

c. Present and future earning ability of Def

St v Loutsch
2003 WI App 16
259 Wis. 2d 901

- But length of sentence does not limit total that may be ordered

St v Fernandez
2009 WI 29
316 Wis. 2d 598

d. Needs and earning ability of Def's dependents

e. Civil settlement and allocation between general and special damages

Herr v Lanaghan
2006 WI App 29
289 Wis. 2d 440
St v Walters
224 Wis. 2d 897
(Ct. App. 1999)

f. Any other factors Ct deems appropriate

§ 973.20(14)(a)
St v Madlock
230 Wis. 2d 324
(Ct. App. 1999)

3) Burden of proving loss, both amount and causation, by preponderance of evidence is on victim

St v Walters
224 Wis. 2d 897
(Ct. App. 1999)

St v Muth
2020 WI 65
392 Wis. 2d 578

St v Szarkowitz
157 Wis. 2d 740
(Ct. App. 1990)

§ 973.20(14)(b)
St v Sweat
208 Wis. 2d 409 (1997)

4) Burden on Def to prove special damages in allocation between general and special damages

   Special damages are excluded from restitution only if enumerated in a civil settlement

5) Burden regarding financial resources, earning ability, and needs of dependents is on Def

6) Def may assert any defense that could be raised in civil action

   a. Except criminal, not civil, statute of limitation applies

   b. Contributory negligence not a defense to restitution

St v Knoll
2000 WI App 135
237 Wis. 2d 384

§ 973.20(13)(c)
St v Krohn
2002 WI App 96
252 Wis. 2d 757
St v Evans
2000 WI App 178
238 Wis. 2d 411

7) When restitution ordered but amount unable to be determined, 4 options:

   a. Order restitution of amounts not in dispute as part of sentence or probation order imposed and direct appropriate agency to file proposed restitution order with Ct within 90 days

   b. Adjourn sentencing for up to 60 days pending resolution of amount of restitution by Ct

   c. With consent of Def, refer disputed restitution issues to arbitrator acceptable to all parties, whose determination of amount of restitution shall be filed with Ct within 60 days

   d. Refer disputed restitution issues to Cir Ct Comm'r or other appropriate referee, who shall conduct hearing and submit record of hearing, together with proposed findings of fact and conclusions of law, to Ct within 60 days after date of referral. Within 30 days after referee's report filed, Ct shall determine amount of restitution